08-3075-CV

United States Court of Appeals for the Second Circuit

LORI S. MASLOW, JEMEL JOHNSON, KENNETH BARTHOLEMEW, PHILIP J. SMALLMAN, and JOHN G. SERPICO,

Plaintiffs-Appellants,

CAROL FAISON, MARIA GOMES, ZACARY LARECHE, and LIVIE ANGLADE,

Plaintiffs,

-against-

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendant-Appellee.

On appeal from the United States District Court for the Eastern District of New York

---

APPELLANTS' BRIEF AND SPECIAL APPENDIX

AARON D. MASLOW
Attorney for Appellants
1761 Stuart Street
Brooklyn, New York 11229
Tel. (718) 375-8211
Fax (718) 375-2114

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

PRELIMINARY STATEMENT

This is an appeal by Plaintiffs-Appellants Lori S. Maslow, Jemel Johnson, Kenneth Bartholomew, Philip J. Smallman, and John G. Serpico from the May 23, 2008 decision of the United States District Court for the Eastern District of New York (Hon. Nicholas G. Garaufis, U.S.D.J.), holding constitutional New York State's "Party Witness Rule" for primary election candidate designating petitions. The decision has not been reported in the National Reporter System but is reported at 2008 WL 2185370. The appellee herein is the Board of Elections in the City of New York.

JURISDICTIONAL STATEMENT

(A) DISTRICT COURT'S JURISDICTION

Plaintiffs sought a judgment declaring that New York Election Law § 6-132(2)'s requirement that a subscribing witness to a primary election candidate designating petition be "a duly qualified voter of the state and an enrolled voter of the same party as the voters qualified to sign the petition" (the "Party Witness Rule") violated the United States Constitution's First and Fourteenth Amendments, as protected by 42 U.S.C. § 1983. The District Court possessed subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (original jurisdiction of civil actions

arising under the Constitution and laws of the United States), 1343(a)(3) (original jurisdiction of civil actions redressing the deprivation under color of state law of rights secured by the Constitution or Acts of Congress), and 2201 (declaratory judgment actions).

(B) COURT OF APPEALS' JURISDICTION

On May 23, 2008, the District Court issued a memorandum and order, and an amended memorandum and order, denying Plaintiffs' motion for summary judgment and granting Defendant's cross-motion for summary judgment. This constituted the final decision of the District Court. The Court of Appeals possesses jurisdiction pursuant to 28 U.S.C. § 1291 (jurisdiction of appeals from final decisions of district courts).

(C) TIMELINESS OF APPEAL

The District Court's memorandum and order and amended memorandum and order were issued on May 23, 2008. The judgment was entered on May 27, 2008. Plaintiffs' notice of appeal was served (via ECF) and filed on June 12, 2008, within the 30-day deadline prescribed by FRAP 4(a)(1)(A).

(D) FINALITY STATEMENT

This appeal is from a final order and judgment which disposed of all of the parties' claims.

ISSUES PRESENTED

1. Was the decision of the U.S. Supreme Court in Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636 (1999), dispositive of whether a state may constitutionally compel primary election candidates to use as designating petition subscribing witnesses only registered voters and party enrollees ("Party Witness Rule")?

The District Court impliedly said no, as it relied solely upon the decision in New York State Bd. of Elections v. Lopez Torres, 128 S.Ct. 791 (2008).

2. Does New York's Party Witness Rule impose a severe burden on core political speech such that it must undergo strict scrutiny?

The District Court did not answer this question; it did not analyze whether the Party Witness Rule merited strict scrutiny.

3. Is New York's Party Witness Rule sufficiently narrowly tailored to advance a compelling state interest?

The District Court did not answer this question; it did not engage in a strict scrutiny-compelling state interest analysis.

4. Is the Equal Protection Clause violated by New York's permitting the circulation of designating petitions by notaries public and commissioners of deeds who are not registered voters and party enrollees but denying that right to

subscribing witnesses (non-notaries and non-commissioners) who are not registered voters and party enrollees?

The District Court did not address the Equal Protection issue.

5. Does the associational right of a political party to exclude non-members from participating in the selection of its general election candidates extend to being able to prevent primary election candidates from utilizing New York resident adults of their choosing as their designating petition circulators?

The District Court said yes.

6. Is petitioning for a primary election a component of party structure and internal party processes?

The District Court said yes.

STATEMENT OF THE CASE

This lawsuit results from the efforts of Plaintiffs-Appellants Philip J. Smallman and John G. Serpico ("Candidate Plaintiffs") to attain ballot position to run for Judge of the Civil Court of the City of New York from Kings County (Borough of Brooklyn), New York State, in the Sept. 12, 2006 Democratic Party primary election.

The designating petitions of Candidate Plaintiffs were challenged by objectors acting on behalf of the Kings County Democratic organization, including

for the reason that signatures thereon had been witnessed by people not registered to vote and/or not enrolled in the Democratic Party in violation of New York Election Law § 6-132(2)'s requirement that a subscribing witness to a party designating petition be "a duly qualified voter of the state and an enrolled voter of the same party as the voters qualified to sign the petition" (the "Party Witness Rule"). (Aaron Maslow Decl. ¶ 24, at A-77)

On July 27, 2006, the Candidate Plaintiffs, along with certain others, commenced an action in the United States District Court for the Eastern District of New York against Defendant-Appellee Board of Elections in the City of New York ("Board of Elections") and others, alleging that the Party Witness Rule violated the First and Fourteenth Amendments, as protected by 42 U.S.C. § 1983, and seeking permanent and preliminary relief. In terms of preliminary relief, a preliminary injunction against enforcement of the Party Witness Rule was sought. Among the Plaintiffs were Jemel Johnson and Kenneth Bartholomew (subscribing witnesses used by Candidate Plaintiffs to circulate their designating petitions) and Lori S. Maslow (a petition signer). (District Court Docket Entry # 1, at A-5)

Board of Elections clerks issued "Clerk's Reports" on the objections to the Candidate Plaintiffs' petitions, in which quantums of signatures were disqualified because they were witnessed by subscribing witnesses not registered to vote or not enrolled in the Democratic Party (including Plaintiffs Johnson and Bartholomew).

However, the petitions still contained more than the minimum 4,000 valid signatures of enrolled Democrats. The objections were thereafter withdrawn, rendering moot the motion for a preliminary injunction. (Aaron Maslow Decl. ¶¶ 27, 28, 30, at A-77 - A-78)

By order dated Aug. 3, 2006, and entered Aug. 10, 2006, the motion for a preliminary injunction was converted to one for summary judgment on the causes of action seeking a declaratory judgment and permanent injunctive relief. (Aaron Maslow Decl. ¶ 34, at A-79) The action was withdrawn against Defendants other than the Board of Elections. (District Court Docket Entry # 11, at A-6) [1]

The Candidate Plaintiffs lost the Sept. 12, 2006 Democratic Party primary election. (Smallman Decl. ¶ 27, at A-112)

Thereafter, on Oct. 25, 2006, Candidate Plaintiffs, along with Plaintiffs Jemel Johnson, Kenneth Bartholomew, Carol Faison, and Lori S. Maslow, served and filed an amended complaint, clarifying the causes of action seeking permanent relief and deleting the causes of action which had sought preliminary relief. Johnson, Bartholomew, Faison, and Maslow asserted that they desired and intended to circulate designating petitions for candidates not enrolled in their respective political parties, including for the Candidate Plaintiffs. (Amended

[1] A stipulation dismissing the state attorney general as a defendant, at his request, was entered on Feb. 23, 2007. (District Court Docket Entry # 29, at A-9)

Complaint, at A-40 - A-56)

By order of Dec. 21, 2006, Defendant Board of Elections was directed to answer the amended complaint (District Court Docket Entry Dec. 21, 2006, at A-7), and it did so on Jan. 9, 2007. (Answer, at A-58 - A-67)

On Mar. 8, 2007, Plaintiffs moved for summary judgment seeking a declaratory judgment and a permanent injunction. (Notice of Motion, at A-69 - A-70) On May 14, 2007, Defendant Board of Elections cross-moved for summary judgment, both on the merits and on the asserted ground that Plaintiffs lacked standing due to mootness. (Notice of Cross-Motion, at A-211 - A-212)

The District Court terminated the motion and cross-motion for summary judgment on Jan. 14, 2008, pending the decision of the U.S. Supreme Court in New York State Bd. of Elections v. Lopez Torres. (District Court Docket Entries Jan. 14, 2008, at A-14) Following the issuance of the Supreme Court's decision in that case, Plaintiffs, on Jan. 31, 2008, sought reinstatement of their motion for summary judgment. (Letter of Aaron Maslow, at A-289 - 291) Defendant similarly sought reinstatement of its cross-motion on Mar. 28, 2008. (Letter of Stephen Kitzinger, at A-293 - A-295)

On May 23, 2008, the District Court (Hon. Nicholas G. Garaufis, U.S.D.J.) issued its memorandum decision and order (and an amended one), in which it held that Plaintiffs possessed standing but that the Party Witness Rule was

constitutional. Plaintiffs' motion for summary judgment was denied and Defendant's cross-motion for summary judgment was granted. (District Court Docket Entries ## 69, 70, at A-14a)

The Clerk's judgment was entered on May 27, 2008. (District Court Docket Entry # 71, at A-14a) On June 12, 2008, Candidate Plaintiffs and Plaintiffs Jemel Johnson, Kenneth Bartholomew, and Lori S. Maslow served and filed a notice of appeal. (District Court Docket Entry # 73, at A-14a)

STATEMENT OF FACTS

(A) NEW YORK'S STATUTORY PROVISIONS

Voter registration is permanent in New York, i.e., one remains registered to vote unless cancelled. NY Election Law § 5-400 et seq. When one registers to vote, one can enroll in a political party. NY Election Law § 5-300.

A political party is defined as a political organization whose candidate for governor at the last gubernatorial election received at least 50,000 votes, NY Election Law § 1-104(3), and, with certain exceptions not relevant here[2], it nominates its general election candidates for public office through a primary election paid for and conducted by the government. NY Election Law §§ 4-136,

[2] E.g., town offices, NY Election Law § 6-108; presidential electors, NY Election Law § 6-102.

6-110, 6-160(1), 8-100. Only the enrolled members of a party can vote in that party's primary election. NY Election Law § 1-104(9). A candidate in a primary election must be a member of the party whose primary is being contested, but this does not apply to candidates for judgeships. NY Election Law § 6-120.

The nomination ("designation" is the term used in the Election Law) of candidates for primary elections is made by filing a designating petition containing a certain minimum number of party member signatures. NY Election Law §§ 6-118, 6-130, 6-132, 6-134, 6-136. Four thousand valid signatures of enrolled party members are required on a Democratic designating petition for Judge of the Civil Court of the City of New York from Kings County. NY Election Law § 6-136(2)(b).

New York Election Law § 6-132(2) requires that a subscribing witness to a designating petition sheet be "a duly qualified voter of the state and an enrolled voter of the same party as the voters qualified to sign the petition."[3] Alternatively signatures may be attested to by a notary public or commissioner of deeds, who must administer an oath to each signer. NY Election Law § 6-132(2),(3). At the bottom of each petition sheet there must appear either a subscribing witness statement or a notarial statement executed by the person who witnessed the

[3] Section 6-132(2)'s requirement that a subscribing witness also be "a resident of the political subdivision in which the office or position is to be voted for" has not been repealed despite its being held unconstitutional by this Court in Lerman v. Board of Elections in City of New York, 232 F.3d 135 (2d Cir. 2000). This unconstitutional provision is not being enforced.

signatures on it. A subscribing witness must attest to his or her party enrollment status. NY Election Law § 6-132(2).

The circulation of designating petitions must take place within the confines of a period of time ending on the ninth Thursday preceding the primary election, NY Election Law § 6-158(1), and beginning 37 days prior thereto. NY Election Law § 6-134(4).

The filing of a designating petition is at the respective board of elections for the jurisdiction involved. NY Election Law §§ 6-144, 6-168(1).

Any registered voter qualified to vote for a public office being contested at a primary election may file objections and specifications of objections to a designating petition for a candidate for such public office, and the local board of elections shall make a determination upon them. NY Election Law § 6-154.

(B) CANDIDATE PLAINTIFFS' 2006 PETITIONING EFFORT

To achieve ballot access as candidates for Civil Court Judge in the Sept. 12, 2006 Democratic primary election, Candidate Plaintiffs needed to file designating petitions containing the signatures of 4,000 enrolled Democrats. (Aaron Maslow Decl. ¶ 23, at A-77)

Gary Tilzer, the Candidate Plaintiffs' petition coordinator, knew that realistically they had to submit 12,000 signatures to make it onto the ballot. He tried to hook them up with candidates for local office, but this was difficult to

accomplish because there was a new Democratic County Chairman. Candidate Plaintiffs were running against the organization-backed candidates and some local candidates wouldn't place non-organization Civil Court Judge candidates on their petitions as it would anger the new Chairman. (Tilzer Aff. ¶ 50, at A-146)

Attempting to organize a crew of petition circulators, Mr. Tilzer contacted intermediaries who had supplied subscribing witnesses in the past and then gave them petition sheets to be circulated by people they recruited. Since this was all done at the last minute, these intermediaries obviously didn't take the time to check the party enrollment of all the subscribing witnesses they recruited for Candidate Plaintiffs. In the end, some of the subscribing witnesses turned out not to be enrolled in the Democratic Party. When these non-Democratic witnesses filled out their witness statements they told the truth about not being Democrats (a subscribing witness must list his or her party enrollment in the witness statement) and wrote in that they were exercising their First Amendment rights to circulate the sheets. (Tilzer Aff. ¶ 50, at A-146 - A-147)

The designating petitions of Candidate Plaintiffs (mostly containing common signatures) were filed with Defendant Board of Elections on July 13, 2006. Candidate Plaintiff Philip J. Smallman filed 13,397 signatures and Candidate Plaintiff John G. Serpico filed 11,971 signatures. (Aaron Maslow Decl. ¶¶ 27, 28, at A-77)

Persons affiliated with the Kings County Democratic organization filed objections against the designating petitions of Candidate Plaintiffs. Among the categories of signatures objected to were those witnessed by people not registered to vote and/or not enrolled in the Democratic Party. Among these challenged signatures were those witnessed by Plaintiffs Jemel Johnson and Kenneth Bartholomew. (Aaron Maslow Decl. ¶¶ 24, 31, at A-77, A-78)

The Objectors, together with the party organization-endorsed candidates for Civil Court Judge, also commenced judicial proceedings in New York State Supreme Court to invalidate the respective petitions of Candidate Plaintiffs. (Aaron Maslow Decl. ¶ 25, at A-77).

On July 31, 2006, a Clerk's Report on the objections to Serpico's petition, prepared by the clerks of the Board of Elections, was issued. It stated that 109 signatures were ruled invalid because the subscribing witness was not registered to vote (SWNR) and 211 were ruled invalid because the subscribing witness was not enrolled in the party (SWNE). This totaled 320 signatures. Of the 11,971 signatures contained in Serpico's petition, the clerks found 7,117 to be invalid, leaving 4,854 valid. (Aaron Maslow Decl. ¶ 27, at A-77 - A-78)

On Aug. 1, 2006, a Clerk's Report on the objections to Smallman's petition, prepared by the clerks of the Board of Elections, was issued. It stated that 119 signatures were ruled invalid because the subscribing witness was not registered to

vote (SWNR) and 211 were ruled invalid because the subscribing witness was not enrolled in the party (SWNE). This totaled 330 signatures. Of the 13,397 signatures contained in Smallman's petition, the clerks found 7,712 to be invalid, leaving 5,685 valid. (Aaron Maslow Decl. ¶ 28, at A-78).

On Aug. 2, 2006, at the hearing conducted by the Board of Elections' commissioners, the Objectors withdrew their objections. The next day, Aug. 3, they also withdrew their judicial proceedings in State Supreme Court seeking invalidation of the designating petitions. (Aaron Maslow Decl. ¶ 30, at A-78)

Among the signatures in Candidate Plaintiffs' petitions ruled invalid on the aforesaid Clerk's Reports were those witnessed by Plaintiffs Jemel Johnson (then a "blank") and Kenneth Bartholomew (enrolled in the Working Families Party); they were not enrolled in the Democratic Party. (Aaron Maslow Decl. ¶ 31, at A-78)

When Plaintiff Jemel Johnson petitioned for Candidate Plaintiffs, he spoke up for the candidates. (Johnson Aff. ¶¶ 3-5, at A-98 - A99) When Plaintiff Kenneth Bartholomew went out asking people to sign he told them that by signing they're giving themselves a choice of candidates to vote for. (Bartholomew Decl. ¶ 6, at A-102)

On Sept. 12, 2006, Smallman and Serpico lost the Democratic Party primary election. (Smallman Decl. ¶ 27, at A-112; Serpico Decl. ¶ 20, at A-123)

Both Candidate Plaintiffs intend to run again for elective judgeships and to

utilize non-registered voters and non-party enrollees to circulate their designating petitions. (Smallman Decl. ¶¶ 33-35, at A-114 - A115; Serpico Decl. ¶¶ 26, 27, at A-125 - A-126)

(C) NON-CANDIDATE PLAINTIFFS

Plaintiffs Johnson, Bartholomew, and Maslow intend to petition for candidates not necessarily members of the respective political parties in which they are enrolled. (Johnson Aff.-Decl. p. 9, at A-183; Bartholomew Decl. ¶¶ 8-10, at A-102 - A103; Lori Maslow Decl. ¶¶ 12, 13, at A-92 - A-93)

Plaintiff Jemel Johnson, now a Democrat, desires to circulate petitions for candidates not necessarily members of his party, to earn money and to work for candidates who earn his help. (Johnson Aff.-Decl. p. 9, at A-183) He asserts that notaries public and commissioners of deeds not enrolled in a party should not be able to circulate designating petitions merely because they, unlike him, can afford to pay the license fee. (Johnson Aff.-Decl. p. 9, at A-183)

Plaintiff Kenneth Bartholomew registered to vote in 2002, and enrolled in the Working Families Party at the time. He liked the fact that the party espoused liberal, progressive ideas. (Bartholomew Decl. ¶ 4, at A-101 - A-102) Plaintiff Bartholomew is African-American and likes to see more African-American candidates get on the ballot. Therefore, in the summer of 2006, he circulated a Democratic Party designating petition for Kenneth Evans for State Assembly

which also designated Plaintiffs Smallman and Serpico for Civil Court Judge. (Bartholomew Decl. ¶ 5, at A-102) When Bartholomew asked people to sign he told them that by signing they're giving themselves a choice of candidates to vote for. (Bartholomew Decl. ¶ 6, at A-102)

Kenneth Bartholomew wants to remain enrolled in the Working Families Party, to continue in future years to petition for Democratic Party candidates, and to have the signatures he procures be counted as valid. Plaintiff Bartholomew does not want to change his enrollment merely to qualify to circulate petitions for Democrats. (Bartholomew Decl. ¶¶ 8-10, at A-102 - A-103)

When Plaintiff Lori S. Maslow ran for State Assembly in 2000, the pool of available subscribing witnesses for her Republican designating petition was less than that for her Democratic opponent; this was due to the lower Republican enrollment. (Lori Maslow Decl. ¶¶ 7, 8, at A-91)

In 2004, Plaintiff Maslow's sister, Miriam Steinberg, ran for Democratic State Committeewoman in the 59th Assembly District. The sister asked Maslow to help get signatures on her petition but Maslow was advised by her sister's election lawyer that if she did so she would be breaking the law since she was a Republican and her sister's petition was for the Democratic primary election. Maslow thereafter changed her enrollment from Republican to Democrat so that she could get signatures for her sister in case the latter ever ran again. New York State's

party enrollment requirement for subscribing witnesses placed Maslow in a Hobson's choice -- either stay in the Republican Party whose views she was more sympathetic with and not be able to help her sister in the future, or change to Democrat merely to help her sister get signatures in the future even though it compromised her principles to enroll as a Democrat. (Lori Maslow Decl. ¶ 9, at A-92)

Plaintiff Lori S. Maslow desires to support the best candidates running for office, even if it means collecting and witnessing signatures for candidates seeking the nomination of political parties in which she is not enrolled. She intends to collect and witness signatures for Philip J. Smallman when he next runs for a judgeship in the different party primary elections, whether it be Democratic, Republican, or other party. (Lori Maslow Decl. ¶¶ 12, 13, at A-92 - A-93)

Plaintiff Lori S. Maslow has never attempted to become qualified as a notary public or commissioner of deeds. She doesn't want to undergo the hassle of studying for and taking the notary test, for which she would have to learn about deeds, oaths, commercial documents, and other technical things having nothing to do with petitioning. Also, she doesn't want to pay the registration fee. She believes it would be difficult to obtain petition signatures as a notary or commissioner of deeds because they must swear in the signers and this would be a hassle. (Lori Maslow Decl. ¶ 21, at A-95)

(D) DEFENDANT BOARD OF ELECTIONS

When rendering determinations on objections and specifications of objections to designating petitions, the Board of Elections has consistently applied the provisions of New York Election Law § 6-132(2) to disqualify signatures witnessed by non-registered voters and non-party enrollees (who were not notaries public or commissioners of deeds). (Aaron Maslow Decl. ¶¶ 44, 45, at A-82)

When the Board of Elections rules on objections and specifications of objections to petitions, it does not rule on fraud or forgery, as this is an issue only for the courts. (Aaron Maslow Decl. ¶ 56, at A-84; Tilzer Aff. ¶ 60, at A-155 - A-156; Ognibene Aff. ¶ 39(D)(a), at A-167 - A-168) Although it has broad subpoena power, in actuality the Board of Elections has not issued subpoenas to compel the attendance of a subscribing witness at any of its petition hearings. (Aaron Maslow Decl. ¶ 56, at A-84) Such subpoenas can be issued in the context of a judicial proceeding to invalidate a petition in State Supreme Court. (Tilzer Aff. ¶ 60, at A-155 - A-156; Aaron Maslow Decl. ¶ 57, at A-84) Indeed, when an objectant to a petition in a judicial proceeding charges fraud or forgery, the subpoenaing of subscribing witnesses is a common occurrence. (Aaron Maslow Decl. ¶ 57, at A-84)

SUMMARY OF THE ARGUMENT

The District Court erred in holding New York's Party Witness Rule to be constitutional. It did not engage in a strict scrutiny/rational basis analysis attendant to First Amendment claims made against state election law provisions. Neither did it analyze whether the Party Witness Rule is sufficiently narrowly tailored to advance a compelling state interest. Had it done so and had it applied Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636 (1999), to the challenged statutory provision, a finding of unconstitutionality should have been made.

Without even considering the impact of the Party Witness Rule on the First Amendment rights of primary election candidates, the District Court's total reliance on New York State Bd. of Elections v. Lopez Torres, 128 S.Ct. 791 (2008), was misplaced. The issue in Lopez Torres involved whether a convention, instead of a primary, could be used to nominate candidates. In analyzing the issue, the Supreme Court focused on the fact that the statute providing for nominations by convention was, on its face, constitutional. The Supreme Court declined to adjudicate constitutionality based on how party officials manipulated the convention to their benefit and to the detriment of insurgents. The method for making nominations -- conventions versus primary elections -- is not at issue in the case at bar. What is at issue is whether the First Amendment affords candidates

the right to use designated agents to speak to the public during the petition circulation process.

The District Court found that Lopez Torres employed broad brush strokes to grant political parties an unfettered right to exclude any persons of its choosing from any and all activities impacting upon who wants to be a primary election candidate. Plaintiffs-Appellants maintain that the District Court erred in extending Lopez Torres far beyond that which was actually decided.

ARGUMENT

POINT I

THIS COURT SHOULD CONDUCT A DE NOVO REVIEW OF THE DISTRICT COURT'S DENIAL OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Recently, in Price v. New York State Bd. of Elections, ___ F.3d ___, 2008 WL 3876598 at 4 (2d Cir. Aug. 22, 2008), this Court articulated the standard of appellate review applicable to a denial of a motion for summary judgment where the constitutionality of a state election statute is at issue:

> This court similarly engages in *de novo* review of the district court's denial of the cross-motion for summary judgment. *Eli Lilly Do Brazil Ltda v. Fed. Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007). The burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *White v. ABCO Eng'g Corp.*, 221 F.3d 293, 300 (2d Cir. 2000). Once the moving party has met its burden, the nonmoving party must present evidence that shows that there is a genuine issue for trial. *Anderson*, 477 U.S. at 255; *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000).

There were no issues of fact in dispute in the within case. Plaintiffs and Defendant did not dispute the applicable statutory provisions. In terms of providing background on the severe impact the Party Witness Rule has on candidates, Plaintiffs submitted affidavits from Gary L. Tilzer, the Candidate Plaintiffs' petition coordinator and a veteran petition organizer, and Thomas V.

Ognibene, a former city councilman and an election attorney. No affidavits were submitted by Defendant contradicting their assertions. Hence, the unrebutted assertions of Tilzer and Ognibene should be accepted as true. In any event, even disregarding these factual assertions, Plaintiffs should have prevailed on what was essentially an issue of law.

Inasmuch as the constitutionality of New York's Party Witness Rule is an issue of law, this Court should employ a de novo standard of review.

POINT II

THE DECISION OF THE U.S. SUPREME COURT IN *BUCKLEY V. AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.,* AND NOT THAT IN *NEW YORK STATE BD. OF ELECTIONS V. LOPEZ TORRES,* IS DISPOSITIVE OF THE ISSUE IN DISPUTE.

(A) *BUCKLEY V. AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.*, AND ITS PROGENY CASES

In Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636 (1999), the Supreme Court held unconstitutional Colorado's statute requiring that initiative petition circulators be registered voters.

"There is no basis to conclude that petition circulation on behalf of a candidate involves any less interactive political speech than petition circulation on behalf of a proposed ballot initiative -- the nature of the regulated activity is identical in each instance." Lerman v. Board of Elections in City of New York, 232 F.3d 135, 148 (2d Cir. 2000) (holding unconstitutional New York's in-district residency requirement for designating petition subscribing witnesses). "Initiative-petition circulators also resemble candidate-petition signature gatherers, however, for both seek ballot access." Buckley, 525 U.S. at 191, 119 S.Ct. at 641-642.

In New York, one must be a registered voter in order to enroll in a political party. NY Election Law § 5-300. Therefore, if it is unconstitutional to require that a petition circulator be a registered voter, it is unconstitutional to require that he or she be enrolled in a political party.

Various federal courts around the country have deemed Buckley as controlling in their determinations that voter registration requirements for candidate petition circulators are unconstitutional. Plaintiffs' research has not located any federal court decision rejecting a claim of unconstitutionality made on behalf of in-state residents who are not registered voters or party members.

In Krislov v. Rednour, 226 F.3d 851 (7th Cir. 2000), the court declared unconstitutional Illinois' statute requiring that primary election candidate petitions be circulated by people registered to vote in the political subdivision for which the candidate was seeking office. Not only did the court declare unconstitutional the voter registration requirement, it also declared unconstitutional the residency requirement, going so far as to hold that circulators did not have to be residents of the state. In the case at bar, Plaintiffs are not arguing that out-of-state residents must be permitted to circulate designating petitions -- merely that the voter registration and party enrollment requirements are unconstitutional.

"If the Commonwealth defines 'qualified electors' who are permitted to verify election petition signatures such that the phrase includes only registered voters, then the statute is clearly unconstitutional under *Buckley*. . . ." Morrill v. Weaver, 224 F.Supp.2d 882, 885 (E.D. Pa. 2002).

"In view of the *Buckley v. American Constitutional Law Foundation* decision, it appears clear that the requirement of Ohio law that circulators be

registered voters is unconstitutional." Blankenship v. Blackwell, 341 F.Supp.2d 911, 921-922 (S.D.Oh. 2004); accord, Moore v. Brunner, 2008 WL 2323530 (S.D.Oh. June 2, 2008) (motion for preliminary injunction).

"*Buckley* strongly suggests the West Virginia statute's resident registered voter requirement for petition circulators is presumptively unconstitutional." Nader 2000 Primary Committee, Inc. v. Hechler, 112 F.Supp.2d 575, 579 (S.D.W.V. 2000).

"[T]his court counts as valid . . . those signatures obtained by circulators who may not have been registered voters in South Dakota. This is despite the fact that SDCL 12-1-3, until July 1, 2000, required circulators to be registered voters. Such requirement became a nullity with the decision of the United States Supreme Court holding that states may not require petition circulators to be registered voters. *See Buckley*. . . ." Nader 2000 Primary Committee, Inc. v. Hazeltine, 110 F.Supp.2d 1201, 1205 (D.S.D.), aff'd on oth grounds, 226 F.3d 979 (8th Cir. 2000). "South Dakota did not repeal this requirement until July 1, 2000, even though it was likely invalidated, at least in part, by the Supreme Court's decision in *Buckley v. American Constitutional Law Found., Inc*. . . ." Nader 2000 Primary Committee, Inc. v. Hazeltine, 226 F.3d 979, 980 n. 2 (8th Cir. 2000).

In Campbell v. Bysiewicz, 242 F.Supp.2d 164, 170-171 (D.Ct. 2003), the court was presented with the issue of the constitutionality of Connecticut's statute

limiting the circulation of petitions to be on a primary ballot to enrolled party members of a municipality entitled to vote in the primary for which the candidacy was being filed. The court found the statute unconstitutional as burdening First Amendment speech and associational rights without advancing a legitimate state interest. Not only did the court rely on Buckley for its determination, but it also relied on the Second Circuit decision in Lerman.

Michigan's requirement that recall petition circulators be registered voters was found unconstitutional in Bogaert v. Land, 2008 WL 3915148 (W.D.Mich. Aug. 27, 2008).

More recently, in Nader v. Brewer, 531 F.3d 1028 (2008), the Ninth Circuit Court of Appeals cited Buckley in holding unconstitutional Arizona's requirement that a candidate petition circulator be qualified to register to vote in the state.

Indeed, in his dissent in Buckley, Chief Justice Rehnquist stated that "And if initiative petition circulation cannot be limited to electors, it would seem that a State can no longer impose an elector or residency requirement on those who circulate petitions to place candidates on ballots, either. At least 19 States plus the District of Columbia explicitly require that candidate petition circulators be electors,[fn] . . . Today's decision appears to place each of these laws in serious constitutional jeopardy." 525 U.S. at 232, 119 S.Ct. at 661 (citing NY Election Law § 6-132 among the statutes affected), cited in Lerman, 232 F.3d at 145.

(B) *NEW YORK STATE BD. OF ELECTIONS V. LOPEZ TORRES*

The District Court did not discuss Buckley in its decision. Rather, it relied exclusively upon New York State Bd. of Elections v. Lopez Torres, 128 S.Ct. 791 (2008), in denying Plaintiffs' constitutional claims.

Lopez Torres involved a challenge to New York's statutorily prescribed method for making party nominations for the office of State Supreme Court justice. Relying mostly on anecdotal evidence showing that party organizations controlled the nominating process to the effective exclusion of insurgents, the plaintiffs maintained that this deprived them of their First Amendment associational rights. The U.S. Supreme Court rejected the constitutional challenge because "None of our cases establishes an individual's constitutional right to have a 'fair shot' at winning the party's nomination." 128 S.Ct. at 799. What constituted a "fair shot," said the Court, was a legislative, not a judicial, determination.

The Court noted, however, that its "cases invalidating ballot-access requirements have focused on the requirements themselves, and not on the manner in which political actors function under those requirements." Id. Indeed, the instant case involves a constitutional challenge to facial statutory requirements. Thus, the rationale of Lopez Torres does not control in the instant case.

Furthermore, much of the Court's decision in Lopez Torres rests upon a determination that a state is free to choose the convention method for making party

nominations. This has no relevance to the issues herein, which focus on who can circulate a candidate designating petition.

Lopez Torres also reiterated the holding of California Democratic Party, which struck down a statute which "permitted non-party members to determine the candidate bearing the party's standard in the general election." Plaintiffs herein, however, do not seek to permit non-party members to determine a party's nominee. Determining a party's nominee takes place in a primary election, where only party members cast ballots on primary election day. The petition circulation process does not determine a party nominee.

Moreover, New York State currently allows non-party members to run for judgeships, thus exposing party members to the views of non-members. In permitting party members to be solicited by non-party notaries and commissioners of deeds, New York has already made a determination that parties are not immune from having their members contacted by outsiders on behalf of candidates.

Additionally, to the extent that Lopez Torres upheld the rights of political parties to set rules concerning their own structure and internal processes, Plaintiffs wish to emphasize that petitioning for a primary election candidate is not a component of party structure and internal party processes. Party structure and internal party processes involve the means used by a party to organize and maintain its hierarchical organization, which includes party meetings and

conventions, none of which are at issue in the case at bar. Petitioning does not take place within the confines of a party meeting or clubhouse. It takes place in the open streets, in public plazas, and by ringing doorbells.

Basically, the Supreme Court held in Lopez Torres that a party cannot be forced to listen to insurgents, but nothing in the decision gives support to the position of Defendant which, in effect, argues that the state and the legally recognized political parties can muzzle certain individuals from acting as First Amendment spokesmen for candidates legally seeking a party nomination.

In fact, there are several statements in the opinion of the Supreme Court in Lopez Torres that lend support to the position of Plaintiffs herein. While "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform," "[t]hese rights are circumscribed." 128 S.Ct. at 797. Hence, the associational membership and candidate-selection rights of a party cannot override the First Amendment rights of lawful candidates to select adults of their choosing to act as their designating petition circulators.

Toward the end of its opinion, the Supreme Court stated, "The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference." 128 S.Ct. at 801, citing

Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22 (1919) (Holmes, J., dissenting). This concept was enshrined into constitutional case law in terms of ballot access petition circulation qualifications in Buckley, Lerman, and other cases. Nothing in Lopez Torres suggests that these cases are no longer valid law.

(C) CONSEQUENCES OF THE DISTRICT COURT'S DECISION

The District Court rested its decision on a broad reading of rights enjoyed by political parties: "The Supreme Court employed broad brush strokes in laying out the constitutional rights of association that belong to political parties -- including their ability to exclude non-members." (A-33)

It cited statements in Lopez Torres which reiterated prior holdings involving parties' associational rights. But these holdings are not in conflict with Plaintiffs' claims. For example, Lopez Torres reiterated that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." 128 S.Ct. at 797 (citing Democratic Party of the U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 101 S.Ct. 1010 (1981), and California Democratic Party v. Jones, 530 U.S. 567, 120 S.Ct. 2402 (2000)). Plaintiffs herein do not seek to compel any political party to accept them as members. The candidate-selection process -- convention versus primary election -- is not at issue in this case either.

The District Court read Lopez Torres as sanctioning a political party's regulation of candidate activities no matter how attenuated they are from voting on primary election day. This deference to political party control of candidates stems in part from an impression that a party "runs its petition process." (A-33) This is erroneous as the petition process is one which can be undertaken by any legally qualified candidate without any input from a party organization. Unless a candidate is not a party member, permission from the party hierarchy to run is not required. (A judicial candidate not a party member does not even need permission. NY Election Law § 6-120.) The District Court has ignored the fact that New York allows insurgents to run as primary election candidates against those candidates endorsed by the party leadership.

Furthermore, the District Court's construction of the rights of political parties "to exclude non-members" and "to choose their standard bearers" (A-33) as encompassing all activities leading up to primary election day has sweeping consequences. If the decision were to stand, there is nothing to stop political parties from prohibiting primary election candidates from accepting assistance from non-party members in the form of financial contributions, distribution of literature, or public endorsements. Parties could prohibit candidates from advertising in non-sanctioned newspapers. They could even prohibit candidates from retaining for their petition drives election lawyers enrolled in other parties.

Clearly such actions of political parties would contravene the First Amendment rights of primary election candidates and their supporters. So too does the Party Witness Rule.

The District Court's decision is plainly inconsistent with Buckley and its progeny cases, including Lerman. Recognizing the First Amendment rights inherent in petition circulation, these cases are still good law and are reconcilable with the Lopez Torres decision, which did not involve petitioning.

POINT III

PETITION CIRCULATION IS CORE POLITICAL SPEECH AND SINCE NEW YORK'S PARTY WITNESS RULE IMPOSES A SEVERE BURDEN ON SUCH SPEECH IT MUST UNDERGO STRICT SCRUTINY.

"A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." Burdick v. Takushi, 504 U.S. 428, 434, 112 S.Ct. 2059, 2063 (1992) (internal quotation marks and citations omitted).

"[W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." Id.

"[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" Meyer v. Grant, 486 U.S. 414, 422, 108 S.Ct. 1886, 1892 (1988). The subject statute "trenches upon an area in which the importance of First

Amendment protections is 'at its zenith.'" Id. at 425, 108 S.Ct. at 1894. Stated Plaintiff Philip J. Smallman, "[T]o the extent I was not able to knowingly utilize non-Democrats as subscribing witnesses, I was limited in expressing my First Amendment message that I was an independent candidate for judge." (Smallman Decl. ¶ 29, at A-113)

"[I]n those cases in which the regulation clearly and directly restricts 'core political speech,' as opposed to the '"mechanics of the electoral process,"' it may make 'little difference whether we determine burden first,' since 'restrictions on core political speech so plainly impose a "severe burden"' that application of strict scrutiny clearly will be necessary. *American Constitutional Law Found*., 119 S.Ct. at 650 (Thomas, J., concurring) (internal citations omitted); *see id*. at 642 n. 12 (opinion of the court); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (declining to apply severe/lesser burdens balancing test to direct regulations of 'pure speech')." Lerman v. Board of Elections in City of New York, 232 F.3d 135, 146 (2d Cir. 2000).

A voter registration requirement on a ballot access petition "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions." Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 193, 119 S.Ct. 636, 643 (1999). Per the New York State Board of Elections, there are approximately 2.5 million people of voting age in New York State, of

which about 1.5 million are in New York City, who are not registered to vote. (Aaron Maslow Decl. ¶¶ 61, 63, at A-87) In 2006, when Plaintiff Candidates ran for Civil Court Judge in Kings County, not only were the millions of non-registered people disqualified from circulating their Democratic Party designating petitions, but so too were the approximate 3.8 million New York State voters enrolled in other parties. (Aaron Maslow Decl. ¶ 59, at A-85) As stated in Krislov v. Rednour, 226 F.3d 851, 860 (7th Cir. 2000), "What is particularly important in this case . . . is the number of people the registration . . . requirements exclude from gathering signatures and thus disseminating the candidates' political message."

While the challenged law does not prohibit non-registered voters and non-party enrollees from speaking on behalf of a candidate or accompanying a legal subscribing witness, "[r]obbed of the incentive of possibly obtaining a valid signature, candidates will be unlikely to utilize non-registered . . . circulators to convey their political message to the public." Krislov, 226 F.3d at 861 n. 5. If a candidate cannot accept the assistance of a non-registered and/or non-enrolled voter willing to help out, without first finding a companion who is a registered and enrolled voter, then the candidate's ability to reach the ballot is jeopardized. See Morrill v. Weaver, 224 F.Supp.2d 882, 898 (E.D. Pa. 2002) (Pennsylvania statute requiring nominating petition affiants to be "qualified electors" found unconstitutional if voter registration is required). That a candidate's disqualified

supporters can accompany legally permitted supporters is "impractical; it is also irrelevant to First Amendment inquiry." Chou v. New York State Board of Elections, 332 F.Supp.2d 510, 515 (E.D.N.Y. 2004). "We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." Lerman, 232 F.3d at 152, quoting California Democratic Party v. Jones, 530 U.S. 567, 581, 120 S.Ct. 2402, 2412 (2000).

It is true that Candidate Plaintiffs could utilize people who are registered voters and party enrollees to circulate their designating petitions when they run again for judgeships, but "[t]he First Amendment protects [their] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." Meyer, 486 U.S. at 424, 108 S.Ct. at 1893. Where a statute prevents candidates from associating for purposes of political expression by organizing nominating petition signature drives with whomever they wish, it burdens their and others' core freedoms of political expression and association. Morrill, 224 F.Supp.2d at 899 (E.D. Pa. 2002). "It is for the speaker, not the government, to choose the best means of expressing a message." Hill v. Colorado, 530 U.S. 703, 781, 120 S.Ct. 2480, 2524 (2000) (Kennedy, J., dissenting).

Moreover, even if there are millions of Democrats who legally can circulate Candidate Plaintiffs' future Democratic Party designating petitions, "it is not

always easy to find members of the public, busy with the concerns of daily life, who are willing to volunteer the serious time and energy required to collect petition signatures." Morrill, 224 F.Supp.2d at 899. In any event, the Supreme Court, in Buckley, "focuses primarily on the number of individuals *inhibited* by the statute in question, not the number who can still express their political views and associate with candidates." Id.

A review by professional petition coordinator Gary L. Tilzer of the Clerk's Reports of Defendant Board of Elections issued on challenges to designating petitions during the period of 2004-2006 conclusively proves that the Party Witness Rule has had a severe burden on petitioning in New York City. During that time period, nearly 20,000 signers of designating petitions were deprived of having their signatures count toward the placement of candidates on the primary election ballot, merely because the people who witnessed their signing were either not registered to vote (SWNR) or were not enrolled in the same political party (SWNE). (Tilzer Aff. ¶¶ 51, 52, at A-147 - A-148)

Mr. Tilzer's

> review of Defendant Board of Elections' Clerk's Reports for those three years also revealed that 11 candidates would have made the primary election ballot during the challenge process before the Board but for the fact that signatures were disqualified on their designating petitions because they were witnessed by non-registered voters and non-party enrollees.

(Tilzer Aff. ¶ 53, at A-148 - A-149).

> [T]here were at least 28 candidates in the last three years whose designating petitions were declared invalid by Defendant Board of Elections and the difference between the legal minimum and the number of valid signatures was less than 100 signatures. Had these candidates been able to utilize subscribing witnesses not registered to vote or not enrolled in the political party of the primary contest who would have gathered a number of signatures equal to the number short, they would have made it onto the ballot during the challenge process before the Board of Elections. In some instances the candidates were just a few signatures short. . . .

(Tilzer Aff. ¶ 55, at A-150 - A-152)

As stated further by Mr. Tilzer:

> The results of my research clearly prove that at the end of the challenge process before the Board of Elections, with the present law being in effect, many candidates have come close to either making it onto the ballot or being removed. Had they been able to utilize as subscribing witnesses any 18-year-old citizen of New York State, the number of total signatures filed could have been higher -- with a decent cushion -- such that the opposition would have been discouraged from even pursuing a challenge.

(Tilzer Aff. ¶ 58, at A-154)

"The burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations. [citation omitted]" Lerman, 232 F.3d at 145. "A decade of litigation in the federal courts has amply demonstrated that New York's ballot access laws, far from maximizing voter choice, historically have placed undue restrictions on ballot access in this state." Ulrich v. Mane, 383 F.Supp.2d 405, 407 (E.D.N.Y. 2005). "'[W]hile recent reforms have mitigated the strict requirements of New

York's ballot access rules, they did not eliminate them. Indeed, the remaining numerical requirements, technical rules, and the administrative and legal proceedings associated with ballot access in New York continue to have a palpable adverse impact upon candidates and their supporters.'" Id. at 412-413.

This Court has recognized the difficulties of New York's ballot access process. See, e.g., Lerman, 232 F.3d at 147-148; Rockefeller v. Powers, 78 F.3d 44, aff'g, 917 F.Supp. 155 (E.D.N.Y. 1996).

The consequential effect of the Party Witness Rule was described by Plaintiff Smallman:

> By not being able to intentionally utilize the services of non-Democrats as subscribing witnesses on my Democratic petition, I filed fewer signatures than I otherwise would have. This inured to my detriment in that I was exposed to a challenge which resulted in a substantial expenditure of time, effort, personnel, and money on my behalf. I could have ignored the challenge and risked the possibility of not making it onto the ballot but I chose to allocate my resources to defending the challenge. As a result, my ability to effectively campaign for the primary election was impaired. I was not able to focus my resources on getting out to the public my message that I was an independent candidate for judge, unbeholden to political party leaders.

(Smallman Decl. ¶ 29, at A-112 - A-113)

Insightful in assessing the resultant burden of New York's designating petition circulation process are the comments from Thomas V. Ognibene, who attempted to run against New York City Mayor Michael Bloomberg in the 2005 Republican Party primary:

21. While the minimum signature requirements of Election Law Section 6-136 may seem reasonable to the uninitiated, the difficulty increases dramatically in relation to the available pool of enrolled voters and the availability of witnesses to secure those signatures.

22. For example, in my Mayoral race of 2005, the minimum signature requirement was 7,500 signatures. This minimum was applicable to the Democratic Party with an enrollment of approximately 2,600,000, to an independent designating petition with an available pool of 4,000,000 voters, and to the Republican Party with an approximate enrollment of 480,000.

. . .

27. In my 2005 Mayoral candidacy, as an insurgent I was denied access to the City-wide Republican organizational structure. However, as a result of my longstanding service to the City as a Councilmember from the 30th District for 10 years and my previous active political involvement for over 30 years, I had numerous offers of assistance from individuals throughout the five boroughs. Firefighters, police officers, school teachers, and generally people of good will that had confidence in my ability, believed in my message and believed that a contested primary election in the Republican Party would have been of great benefit to the people of this City. Unfortunately, because of the vagaries of politics in the City of New York they were enrolled in the Democrat Party or were "independents." Yet, each wanted to advocate on my behalf and vote for me in the November General Election. None were aware that their enrollment would act as a barrier to this very necessary supportive conduct. They legally were precluded from circulating my Republican designating petition.

28. The role of a petition witness is to secure support for his or her potential candidate. They must speak on behalf on the candidate, explain the candidate's positions, and distribute literature to the potential signer of the petition. This role is more akin to the exercise of political speech and advocacy on behalf of a candidate than being a party functionary performing a menial administrative task. The party enrollment of the witness is subservient to this higher calling.

. . .

30. I am confident that had I had access to these available non-Republican enrolled witnesses I would have secured a position on the Republican Mayoral primary ballot.

> 31. Not only with respect to my candidacy, but when I act as an attorney on behalf of a candidate and meet with his potential petition witnesses to explain the process, the first question I ask is, "How many of you are not enrolled in the _____ Party?" Generally they comprise 10 to 20 percent of those desiring to assist the candidate and they are distressed to learn that they cannot assist in the process.

(Ognibene Aff. ¶¶ 21-31, at A-162 - A-164)

Apart from its impact on candidates, the Party Witness Rule has a devastating impact on individuals who wish to circulate petitions. For Plaintiffs Jemel Johnson and Kenneth Bartholomew, the burden imposed by Election Law § 6-132(2)'s party enrollment requirement was extremely severe in that it absolutely barred them from legally circulating the petitions of the Candidate Plaintiffs.

As stated in Lerman, 232 F.3d at 146, "The petition circulation activity at issue in this case, while part of the ballot access process, clearly constituted core political speech subject to exacting scrutiny." Accord, Morrill, 224 F.Supp.2d at 900 ("[D]emanding that nominating petition affiants in Pennsylvania be registered voters would impose a severe burden on Plaintiffs' and other Pennsylvania citizens' constitutional freedoms.")

Since the burden imposed by the Party Witness Rule is severe, it must be narrowly tailored to advance a compelling state interest in order to pass constitutional muster. Buckley, 525 U.S. at 192 n. 12, 119 S.Ct. at 642 n. 12 (assessing constitutionality of petition witness voter registration requirement);

Krislov, 226 F.3d at 863 (assessing constitutionality of petition witness voter registration and residence requirements); Morrill, 224 F.Supp.2d at 898 (assessing constitutionality of petition witness voter registration and residence requirements); see Lerman, 232 F.3d at 149 (assessing constitutionality of petition witness residence requirement); Chou, 332 F.Supp.2d at 516 (assessing constitutionality of petition witness residence requirement).

POINT IV

NEW YORK'S PARTY WITNESS RULE IS NOT SUFFICIENTLY NARROWLY TAILORED TO ADVANCE A COMPELLING STATE INTEREST.

Before the District Court, Defendant asserted two interests in support of the Party Witness Rule: protecting the associational rights of political parties and preventing ballot access fraud.[4] The District Court did not address ballot access fraud but rested its decision on a broad reading of the discussion of parties' associational rights in New York State Bd. of Elections v. Lopez Torres, 128 S.Ct. 791 (2008), as discussed in Point II herein.

(A) PROTECTING ASSOCIATIONAL RIGHTS OF PARTIES

Even prior to the Supreme Court's issuance of its decision in Lopez Torres, Defendant argued before the District Court that the Party Witness Rule protects the First Amendment associational rights of political parties in selecting their candidates. It argued that a party should not be put to the expense of fighting off a primary candidate placed on the ballot through the efforts of non-party members; also that the Party Witness Rule limited the possibilities of party raiding and improper influence of outsiders who may wish to crowd the party's ballot, create

[4] The parties' motion papers were filed with the District Court in the spring of 2007, prior to the issuance by the Supreme Court on Jan. 16, 2008, of its decision in Lopez Torres. Thereafter the parties briefed the impact of that case in letters to the District Court.

voter confusion, or influence the party's message.

In its memorandum of law to the District Court, Defendant Board of Elections cited several U.S. Supreme Court cases in support of its position, e.g., California Democratic Party v. Jones, 530 U.S. 567, 120 S.Ct. 2402 (2000); Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 109 S.Ct. 1013 (1989); Tashjian v. Republican Party of Connecticut, 479 U.S.208, 107 S.Ct. 544 (1986); Democratic Party of the U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 101 S.Ct. 1010 (1981); and Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245 (1973). The common thread of these cases, however, is that a party is entitled to have decisions made under its name at the ultimate moment only through the participation of party members or outsiders specifically invited in by the party. The ultimate moment when decisions are made is the party primary. None of these decisions touched upon the activities of outsiders prior to the party primary.

In other words, the state can limit voting in party primaries to people who have undergone a waiting period as party members, Rosario, supra, and the actual decision-making process for nominating or electing candidates under the party banner can be limited to party members, California Democratic Party, supra; Democratic Party of the U.S., supra, or to non-party members invited by the party to participate. Tashjian, supra. Where an election is held, the party members can

associate together and support a candidate. See Eu, supra.

No decision of the U.S. Supreme Court, however, has prohibited outsiders from engaging in First Amendment activity in support of candidates at a point in time prior to the actual moment of the decision. Put another way, the Supreme Court and the lower federal courts have not prohibited non-party members from campaigning for or otherwise advocating for candidates running in a party primary election. In fact, by specifically allowing non-registered voters to witness ballot petition signatures, the decision in Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636 (1999), impliedly holds otherwise. More specifically, the Seventh Circuit Court of Appeals has declared that outsiders may advocate for a party primary contestant by assisting that candidate in achieving ballot access (even though that person could not ultimately vote for the candidate). Krislov v. Rednour, 226 F.3d 851 (2000). As noted in Point II of this brief, there are federal court decisions in other states which explicitly hold that the principle enunciated in Buckley applies to candidate nominating petitions.

New York's highest court, the Court of Appeals, has expressed doubt that preventing the intrusion of "outsiders" in a local political organization's nominating process is even a legitimate interest. LaBrake v. Dukes, 96 N.Y.2d 913, 915, 733 N.Y.S.2d 133, 134 (2001).

The argument that outsiders may be excluded from the petitioning process

was rejected emphatically by this Court in Lerman, 232 F.3d 135, 152 (2d Cir. 2000):

> A desire to fence out non-residents' political speech -- and to prevent both residents and non-residents from associating for political purposes across district boundaries -- simply cannot be reconciled with the First Amendment's purpose of ensuring "the widest possible dissemination of information from diverse and antagonistic sources." *Krislov,* 226 F.3d at 866 (quoting *Buckley v. Valeo,* 424 U.S. 1, 49, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)); *see also Warren v. Fairfax County,* 196 F.3d 186, 190 (4th Cir. 1999) (en banc) (invalidating law prohibiting non-residents from using public forum); *VanNatta v. Keisling,* 151 F.3d 1215, 1218 (9th Cir. 1998) (invalidating law prohibiting candidates from accepting campaign contributions from outside their district), *cert. denied,* 525 U.S. 1104, 119 S.Ct. 870, 142 L.Ed.2d 771 (1999). In any event, the strength of this asserted interest in preventing outsiders from influencing politics within the district is undermined by the exception to the residence requirement that permits notaries public and commissioners of deeds -- even if they live outside the relevant political subdivision -- to circulate and witness candidates' ballot access petitions. *See* N.Y. Elec. L. § 6-132(3) (McKinney 1998) (exception for notaries public and commissioners of deeds); *Molinari,* 82 F.Supp.2d at 74.

In rejecting the argument that outsiders should not be permitted to get involved in Illinois primary contests, the Seventh Circuit Court of Appeals analyzed the issue similarly:

> To the extent this law is designed to serve a third interest -- preventing citizens of other States from having any influence on Illinois elections -- we question its legitimacy. Such laws are harmful to the unity of our Nation because they penalize and discriminate against candidates who wish to associate with and utilize the speech of non-residents. Allowing citizens of the other forty-nine States to circulate petitions increases the opportunity for the free flow of political ideas. In some cases this might entail the introduction of ideas which are novel to a particular geographic area, or which are unpopular. But the First

> Amendment "was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people." *Buckley v. Valeo*, 424 U.S. at 49, 96 S.Ct. 612 (internal punctuation omitted). This surely includes ideas from citizens of other States, and especially political ideas. Because circulating nominating petitions necessarily entails political speech, it follows that the First and Fourteenth Amendments compel States to allow their candidates to associate with nonresidents for political purposes and to utilize non-residents to speak on their behalf in soliciting signatures for ballot access petitions. [citations omitted] Therefore, section 7/10 is not narrowly tailored to serve a compelling state interest. It therefore violates the First Amendment rights of the candidates and its enforcement must be enjoined.

Krislov, 226 F.3d at 866.

New York has already expressed an opinion that it is not fraudulent for members of one party to aid a candidate in another party's primary election to achieve ballot access. In O'Donovan v. Board of Elections, 176 A.D.2d 229, 574 N.Y.S.2d 56 (2d Dept. 1991), the court held:

> While the record does indicate that "politically prominent" Republicans aided the appellant in connection with his designating petition by picking up blank petition sheets from the printer, recruiting registered Democrats to circulate some of the petition sheets, and reviewing and copying the completed petition before it was filed, those actions were not sufficient to demonstrate that the petition was permeated with fraud.

New York has also sustained the First Amendment rights of one party to affect the outcome of another party's primary election through the expenditure of funds. In Avella v. Batt, 33 A.D.3d 77, 820 N.Y.S.2d 332 (3d Dept. 2006), the

court declared unconstitutional New York Election Law § 2-126, which prohibited party committees from expending funds in primary elections, in a case involving the expenditure of money by the Working Families Party to affect the outcome of a Democratic Party primary election. The Third Department Appellate Division of New York's Supreme Court held that the First Amendment right of political speech trumps a party's right to be free of external influence from other parties:

> To the extent that the Board of Elections relies upon its prior opinions to argue that the statute promotes the compelling state interests of preventing the interference of one party in another party's affairs and ensuring that all citizens who are enrolled in a particular party have equal rights at a primary election (see 1986 Op Bd of Elections No. 1; 1983 Op Bd of Elections No. 7; *see also Theofel v. Butler*, *supra* at 264), its argument also fails. "A 'highly paternalistic approach' limiting what people may hear is generally suspect ···, [and] it is particularly egregious where the [s]tate censors the political speech a political party shares with its members" (*Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223-224 [1989], supra), as the statute does here. In our view, the unsupported assertions that permitting a political party to spend money in communicating with the public regarding candidates running in primary elections will lead to interparty manipulation and the control of the primary process by party machines do not reflect compelling state interests sufficient to support the severe burden imposed upon parties' First Amendment rights by the statute at issue here.

33 A.D.3d at 85, 820 N.Y.S.2d at 339-340. Accord, Kermani v. New York State Board of Elections, 2006 WL 2190716 (N.D.N.Y. July 25, 2006) (holding unconstitutional NY Election § 2-126's prohibition against party committee's expenditure of funds in primary election).

As the law exists now, a political party may expend money to pay petition

circulators to gather signatures for another party's candidates but the party is precluded from having its own members do so. This is incongruous in terms of First Amendment jurisprudence.

Moreover, New York cannot seriously assert that the Party Witness Rule serves a compelling interest in protecting the associational rights of a political party from the influence of non-party members when it permits notaries and commissioners of deeds who are not party members to attest to signatures on designating petitions. See Lerman, 232 F.3d at 152; LaBrake, 96 N.Y.2d at 915, 733 N.Y.S.2d at 135-136. Notaries do not even have to live in the state if they have an office or place of business in it. NY Executive Law § 130. A commissioner of deeds who maintains a law office in New York City may reside outside the state. Id. § 140(5-a).

Additionally, New York allows non-party members to impact the ballot access process for a party primary when it permits them to file objections against candidates for public office, NY Election Law § 6-154, a provision held to be constitutional in Queens County Republican Committee v. New York State Board of Elections, 222 F.Supp.2d 341 (E.D.N.Y. 2002).

Furthermore, in the context of a primary contest for judicial office, the justification offered for the Party Witness Rule -- prevent interference from outsiders -- is not a rational one because a candidate need not even be a party

member. NY Election Law § 6-120(4). If Plaintiff Philip J. Smallman, who was not an enrolled Democrat (Smallman Decl. ¶ 7, at A-106), is legally permitted to run in the Democratic primary, then the state has no cognizable interest in mandating that his agents of speech -- his petition circulators -- be Democrats.

A further incongruity exists in that presently, a Democrat from Buffalo who comes to Brooklyn to work for pay in gathering signatures on a Democratic petition is permitted to do so, but a Republican who lives next to her neighbor, a Democratic candidate, whom she is helping on a volunteer basis, is prohibited. This makes no sense. The Democrat from Buffalo is intruding into the local Democratic primary to the same extent as the Republican neighbor. Ultimately, the First Amendment free speech right of the candidate to choose his own petition circulators outweighs whatever interest the local party organization has in preventing ordinary enrollees from being confronted by a non-enrollee petition circulator.

As drawn, the "Party Witness Rule" does not serve the interest of preventing party raiding. By overbroadly prohibiting candidates from exercising their First Amendment rights through non-party members, the state has lumped into one category "party raiders" and sincere petition gatherers.

The Election Law already has several mechanisms in place to prevent "party raiding." Foremost is the requirement that all signers of a petition must be party

members. It is ultimately their decision whether to allow a person into their primary. If enough want to sign a party petition being circulated by outsiders, then the situation no longer is considered "party raiding," but rather party members desiring that a candidate be placed on the ballot. See Krislov, 226 F.3d at 865 (interest served by limiting signatories to Illinois signers, and limiting voting to in-staters in primaries and general elections); Lerman, 232 F.3d at 151 ("[T]hat interest is already advanced by the requirement that candidates obtain a minimum number of signatures from district residents.")

Defendant argued below that a party should not be compelled to absorb the cost of a primary created through the efforts of non-party members. However, "[T]his argument is based on an erroneous factual premise. It is not the witness who imposes the cost of a primary on the district, it is only registered [party members] who reside in the district and who sign the petition that impose the cost of a primary. . . ." Molinari v. Powers, 82 F.Supp.2d 57, 74 (2000).

Moreover, if the party leadership fears that a candidate is being insinuated into its primary by outsiders it can so inform its membership and urge them not to sign the designating petition of the "outsider candidate."

The Wilson-Pakula Law, embodied in Election Law § 6-120, also serves as the real deterrent to "party raiding." It requires that candidates be enrolled in the party whose primary they are contesting, and if not, then they must get permission

to run from the appropriate party committee. The Wilson-Pakula Law acting alone, without the existence of the Party Witness Rule, would adequately prevent party raiding.

Party raiding in New York can also be checked by commencing judicial proceedings to disenroll a person not in sympathy with a party's principles. NY Election Law § 16-110(2). Registered voters who enrolled for the purpose of aiding another party's candidate to capture the party nomination can be expelled. E.g., Werbel v. Gernstein, 191 Misc. 275, 78 N.Y.S.2d 440 (Sup. Ct. Kings Co.), aff'd, 273 A.D. 917, 78 N.Y.S.2d 926 (2d Dept. 1948); Zuckman v. Donahue, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct. Albany Co.), aff'd, 274 A.D. 216, 80 N.Y.S.2d 698 (3d Dept.), aff'd, 298 N.Y. 627, 81 N.E.2d 371 (1948).

As discussed in Point II above, Lopez Torres should not be read so broadly as to grant political parties carte blanche to regulate all pre-primary election activities of candidates. That case was limited to the constitutionality of judicial conventions being manipulated by party leaders to the detriment of insurgents.

The foremost concern in terms of party associational rights is whether an election ballot conveys to voters that a party endorses a candidate against its will. Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184, 1196 (2008) (Roberts, C.J., concurring). The other concern implicated in party associational rights is that non-party members must not be permitted to vote to

choose the party's nominees unless they are invited to do so by the party. Inasmuch as a candidate's use of non-party members as subscribing witnesses on his or her designating petitions does not involve these concerns, Lopez Torres should not be read as determinative of the issue in the case at bar.

Since non-party members can circulate petitions as notaries or commissioners of deeds, it is Plaintiffs' position that the state's asserted interest in insulating a political party from outsiders impacting upon the party's primary via means other than actual voting is not a compelling one. However, even if it were compelling, the Party Witness Rule is not sufficiently narrowly tailored to advance a compelling state interest because that interest is served by the Wilson-Pakula Law, which requires party permission for non-party members to run in the party's primary, NY Election Law § 6-120; the availability of a disenrollment proceeding, NY Election Law § 16-110(2); and the requirements that limit the signing of designating petitions and voting in primary elections to party members, NY Election Law §§ 6-136, 1-104(9).

(B) PREVENTING BALLOT ACCESS FRAUD

Defendant also argued to the District Court that the Party Witness Rule is narrowly tailored to meet the state's compelling interest in preventing fraud.

Unquestionably, preventing fraud in the petition circulation process is a compelling state interest. Lerman, 232 F.3d at 149; Krislov, 226 F.3d at 859. But

there is no meaningful relationship between the Party Witness Rule and the interest in protecting the integrity of signature collecting.

Firstly, it must be noted that Defendant Board of Elections does not rule on issues of fraud or forgery. E.g., Waters v. Cohen, 248 A.D. 830, 290 N.Y.S. 72 (2d Dept. 1936); Aaron Maslow Decl. ¶ 56, at A-84; Tilzer Aff. ¶ 60, at A-155; Ognibene Aff. ¶ 39(D)(a), at A-168. The Board of Elections has not been known to issue subpoenas to compel the attendance of a subscribing witness at any of its petition hearings. (Aaron Maslow Decl. ¶ 56, at A-84) Therefore, no interest of the Board of Elections is served by having subscribing witnesses set forth their voter registration and party enrollment status in the witness statements on designating petition sheets.

Secondly, fraud occurs even under the present law which bars non-party members from witnessing signatures. The case reports are replete with hundreds of cases involving forgery and fraud. See, e.g., Haskell v. Gargiulo, 51 N.Y.2d 747, 411 N.E.2d 778 (1980); Lerner v. Power, 22 N.Y.2d 767, 292 N.Y.S.2d 471 (1968); DeAngelo v. DiFilippo, 196 A.D.2d 608, 601 N.Y.S.2d 346 (2d Dept. 1993); D'Andre v. Canary, 114 A.D.2d 430, 494 N.Y.S.2d 144 (2d Dept. 1985); Haas v. Costigan, 14 A.D.2d 809, 221 N.Y.S.2d 138 (1961). This proves that the present law does not advance an interest in preventing fraud.

The real deterrence to fraud is the potentiality of being challenged in a

judicial proceeding to invalidate a petition in State Supreme Court, where one can be subpoenaed. E.g., Adams v. Klapper, 182 Misc.2d 51, 696 N.Y.S.2d 758 (Sup. Ct. Kings Co.), aff'd, 264 A.D.2d 696, 695 N.Y.S.2d 295 (2d Dept. 1999); Oberle v. Caracappa, 133 A.D.2d 202, 518 N.Y.S.2d 989 (2d Dept. 1987); MacDougall v. Board of Elections of City of New York, 133 A.D.2d 198, 518 N.Y.S.2d 840 (2d Dept. 1987); Aaron Maslow Decl. ¶ 57, at A-84 - A-85; Tilzer Aff. ¶ 60, at A-155 - A-156. If fraud permeates a petition, it will be invalidated by the New York State courts. E.g., Haskell v. Gargiulo, supra (12 signatories did not make required affirmation; candidate's brother made misrepresentations to a non-English speaking signatory; candidate acted as subscribing witness to signature taken by another person; candidates failed to call subscribing witnesses under their control); Lerner v. Power, supra (146 signatures were placed on petition by persons signing for other members of their families); DeAngelo v. DiFilippo, supra (names of candidates inserted subsequent to sheets being signed and some candidates hadn't consented to run); D'Andre v. Canary, supra (six sheets of signatures witnessed by same individual contained numerous obvious forgeries); Haas v. Costigan, supra (forgery; subscribing witnesses not produced in court). Hence, the specter of being subpoenaed and a candidate's fear of his petition being invalidated due to fraud -- not a prohibition on non-party enrollees from circulating -- advance the state's interest in preventing fraud.

It is simply not rational to assume that merely because one is a Democrat one will be more honest in collecting signatures on a Democratic petition and because one is not a Democrat one will be dishonest in collecting signatures on that petition. The previously-mentioned Democrat from Buffalo may be induced to forge lots of signatures so that he can put in for many hours of work to be paid for. The Republican woman who lives next door to her Democratic friend, the candidate, has a strong interest in collecting signatures most scrupulously so that she can help him.

A statutory provision which substantially burdens political speech and association at the petition stage of the electoral process should not be upheld without insisting that defendants do more than simply "posit the existence of the disease sought to be cured." Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 664, 114 S.Ct. 2445, 2470 (1994), cited in Lerman, 232 F.3d at 150.

In Lerman, the court stated that the registration requirement is "more narrowly tailored to the state's interest in insuring the integrity of the ballot access process than the witness residence requirement." 232 F.3d at 150 n. 14. However, this dicta amidst the court's discussion of petition fraud does not state that the requirement is *sufficiently* narrowly tailored to advance the state's interest in protecting against abuses in the process. The fit between the end to be served by the statute and the means selected to achieve it is not particularly tight. The

overbroad Party Witness Rule is not sufficiently narrowly tailored to advance a compelling state interest in preventing fraud because that interest would be served by merely requiring petition witnesses to be citizens resident in New York who are 18 years of age or older and to list their addresses in their witness statements so they can be subpoenaed in judicial proceedings. Buckley, 525 U.S. at 196, 119 S.Ct. at 644 ("The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the 'address at which he or she resides, including the street name and number, the city or town, [and] the county.'")

Likewise, the New York State Court of Appeals has acknowledged that the state possesses an interest in protecting the integrity of the nominating process by assuring that a subscribing witness is subject to subpoena in a proceeding challenging the petition. That interest, however, according to that court, is satisfied by "the dual requirement that the witness's address be disclosed and that the witness be a State resident." LaBrake v. Dukes, 96 N.Y.2d 913, 915, 733 N.Y.S.2d 133, 134 (2001) (holding unconstitutional witness residency requirement).

POINT V

PERMITTING NOTARIES PUBLIC AND COMMISSIONERS OF DEEDS TO CIRCULATE DESIGNATING PETITIONS WITHOUT HAVING TO BE REGISTERED TO VOTE AND ENROLLED IN THE PARTY DENIES EQUAL PROTECTION TO NON-NOTARIAL SUBSCRIBING WITNESSES NOT REGISTERED OR NOT ENROLLED.

The unique creation of two classes of petition circulators in New York -- notaries (this includes commissioners of deeds) and party-enrollee subscribing witnesses -- raises an Equal Protection issue. As noted earlier, notaries public and commissioners of deeds are not required to be registered and enrolled voters in order to attest to designating petition signatures. They do not even have to live in New York State. NY Executive Law §§ 130, 140(5-a). Plaintiffs assert that the disparity in treatment violates their Equal Protection rights. (Amended Complaint ¶¶ 86-87, at A-55)

Non-party members could conceivably become notaries or commissioners of deeds by paying the licensing fee, but as the court in Molinari v. Powers, 82 F.Supp2d 57 (E.D.N.Y. 2000), noted:

> No one makes a living as a notary public. Those who qualify pay a fee of $30 and (unless they are lawyers) take a written examination. New York Executive Law § 131. They usually do so as an accommodation to clients (as in the case of lawyers) or to customers (as in the case of bank officers and others). One has to either recruit volunteers from this group [ ] or pay notaries substantially for their services (as Mr. Forbes did, often after financing their efforts to become notaries). Short of that, a potential volunteer must go through

> the time and expense of becoming a notary. The availability of this " 'more burdensome' " alternative is not sufficient to relieve the burden that the residence requirement imposes on the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. at 1893, 100 L.Ed.2d 425 (1988) (citation omitted) (holding that the alternative of volunteer initiative-petition circulators did not mitigate the burden imposed by the prohibition against paid circulators).

82 F.Supp.2d at 76-77. The court also noted how few notaries there were (247,830) compared to the number of enrolled voters. 82 F.Supp.2d at 76 n. 11.

"That [Candidate Plaintiffs] remain free to employ other means to disseminate their ideas [by using notaries] does not take their speech through petition circulators outside the bounds of First Amendment protection." Meyer v. Grant, 486 U.S. 414, 424, 108 S.Ct. 1886, 1893 (1988) (holding unconstitutional a ban on paying petition circulators).

Since Molinari was decided, the notary application fee has increased to $60, NY Executive Law § 131(3), and the fee for re-appointment has also increased to $60. Id., § 131(9). The fee for appointment or re-appointment as a commissioner of deeds in New York City is $25. Id., § 140(3).

Plaintiff Jemel Johnson asserts that notaries public and commissioners of deeds not enrolled in a party should not be able to circulate designating petitions merely because they, unlike him, can afford to pay the license fee. (Johnson Aff.-Decl. p. 9, at A-183)

"[A] State "violates the Equal Protection Clause of the Fourteenth

Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666, 86 S.Ct. 1079, 1081 (1966). Early Supreme Court election law cases deciding Equal Protection claims against ballot access fees applied strict scrutiny analysis. E.g., Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 856 (1972). Petition requirements challenged under the Equal Protection Clause also received strict scrutiny. E.g., Williams v. Rhodes, 393 U.S. 23, 31, 89 S.Ct. 5, 11 (1968).

Even if a balancing test were applied as enunciated in Burdick v. Takushi, 504 U.S. 428, 434, 112 S.Ct. 2059, 2063 (1992) -- "weigh[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights" -- there would still be an Equal Protection violation.

The burden of prohibiting solicitation of petition signatures is a severe one, as noted above in Point III. Creating a class of non-party members who are permitted to solicit signatures to the exclusion of those not paying the notary or commissioner fee must therefore be justified by a compelling state interest and the means used to achieve the interest must be sufficiently narrowly tailored to advance that interest.

One might assume that the disparate treatment here would be justified by the state on the basis that a notary or commissioner of deeds would be more honest in collecting signatures. However, it is not rational to assume that the payment of a fee to become a notary or commissioner imbues one with honesty. Thus, so long as a licensing fee is required, the notary-commissioner provision is not sufficiently narrowly tailored to advance the state interest in promoting the honest solicitation of signatures. New York might have a better defense to its notary-commissioner exception to the requirement that petition circulators be registered voters and enrolled party members if it enabled people to become notaries and commissioners without having to pay a fee.

In any event, since Defendant has advanced the associational rights of political parties as the chief basis for excluding non-party members from soliciting petition signatures, it cannot seriously claim that permitting notaries and commissioners advances a compelling state interest.

CONCLUSION

The requirement of New York Election Law § 6-132(2) that a subscribing witness to a party designating petition be "a duly qualified voter of the state and an enrolled voter of the same party as the voters qualified to sign the petition" is not sufficiently narrowly tailored to advance a compelling state interest.

For the foregoing reasons, it is respectfully submitted that the District Court's memorandum and order, and the amended memorandum and order (Hon. Nicholas G. Garaufis, U.S.D.J.), both dated and entered May 23, 2008, and the judgment, dated May 23, 2008 and entered May 27, 2008, should be reversed. A judgment should issue declaring that the aforecited statutory provision violates the United States Constitution's First and Fourteenth Amendment freedoms of candidates, petition circulators, and voters, as protected by 42 U.S.C. § 1983. Defendant should also be permanently enjoined from implementing and enforcing said provision of law.

Any statutory provisions and administrative regulations, guidelines, and rules implementing and enforcing said requirement should also be declared unconstitutional and their enforcement should likewise be permanently enjoined. This would include the following mandated language in the statement of witness prescribed by Election Law § 6-132(2): "I am a duly qualified voter of the State of New York and am an enrolled voter of the . . . . party."

Dated: Brooklyn, New York
September 15, 2008

Respectfully submitted,

_____

AARON D. MASLOW
Attorney for Plaintiffs-Appellants
1761 Stuart Street
Brooklyn, NY 11229
Tel. (718) 375-8211
Fax (718) 375-2114
E-mail: themaslows@aol.com

CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,755 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 as the word processing program. The typeface used is Times New Roman and the font size is 14-point.

Dated: Brooklyn, New York
September 15, 2008

_____
AARON D. MASLOW
Attorney for Plaintiffs-Appellants

SPECIAL APPENDIX

NY ELECTION LAW § 6-132

1. Each sheet of a designating petition shall be signed in ink and shall contain the following information and shall be in substantially the following form:

I, the undersigned, do hereby state that I am a duly enrolled voter of the ..... party and entitled to vote at the next primary election of such party, to be held on ....., 20...; that my place of residence is truly stated opposite my signature hereto, and I do hereby designate the following named person (or persons) as a candidate (or candidates) for the nomination of such party for public office or for election to a party position of such party.

Names of candidates	Public Office or party position	Place of Residence (also post office address, if not identical)
.....	.....	.....
.....	.....	.....

I do hereby appoint ..... (insert the names and addresses of at least three persons, all of whom shall be enrolled voters of said party) as a committee to fill vacancies in accordance with the provisions of the election law.

In witness whereof, I have hereunto set my hand, the day and year placed opposite my signature.

Date	Name of Signer	Residence	Town or city (except in the city of New York, the county)
.....	.....	.....	.....
.....	.....	.....	.....

2. There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the political subdivision in which the office or position is to be voted for. However, in the case of a petition for election to the party position of member of the county committee, residence in the same county shall be sufficient. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same

penalties as if he or she had been duly sworn. The form of such statement shall be substantially as follows:

STATEMENT OF WITNESS

I, ... (name of witness) state: I am a duly qualified voter of the State of New York and am an enrolled voter of the ..... party. I now reside at ..... (residence address).

Each of the individuals whose names are subscribed to this petition sheet containing ..... (fill in number) signatures, subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Date: ....
Signature of Witness

Witness identification information: The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid.

Town or City County
....

3. In lieu of the signed statement of a witness who is a duly qualified voter of the state qualified to sign the petition, the following statement signed by a notary public or commissioner of deeds shall be accepted:

On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing ..... (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself or herself, said that the foregoing statement made and subscribed by him or her, was true.

Date:..... .....
(Signature and official title
of officer administering oath)

4. The state board of elections shall prepare a sample form of a designating petition which meets the requirements of this section and shall distribute or cause such forms to be distributed to each board of elections. Such forms shall be made available to the public, upon request, by the state board of elections and each such board. Any petition that is a copy of such a sample shall be deemed to meet the requirements of form imposed by this section.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

LORI S. MASLOW, *et al.*,

Plaintiffs,

v.

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendant.
_____X

MEMORANDUM & ORDER
06-CV-3683 (NGG) (SMG)

NICHOLAS G. GARAUFIS, United States District Judge:

Plaintiffs bring this action to challenge the rule of Defendant Board of Elections in the City of New York ("Defendant" or "Board of Election") that a candidate collecting signatures on a designating petition must utilize only subscribing witnesses who are registered members of that candidate's party, codified at New York Election Law § 6-132(2) ("Party-Witness Rule"). Plaintiffs and Defendant have filed cross motions for summary judgment. For the reasons that follow, Plaintiffs' motion for summary judgment is denied and Defendant's motion for summary judgment is granted.

I. Standard of Review

When deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and must draw all permissible inferences in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court will accept as fact only those facts included in the parties' Local Civil Rule 56.1 statements of material fact and supported by citations to the record. Local Civil Rule 56.1. Any numbered paragraph in the parties' statement of material facts will be deemed to be admitted for purposes of their motions

unless specifically controverted by a correspondingly numbered paragraph in the opposing side's statement. Id.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c), *i.e.*, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001). "A fact is 'material' for these purposes if it might affect the outcome of the suit under the governing law. An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The moving party has the burden of establishing the absence of a genuine issue of material fact. Liberty Lobby, 477 U.S. at 256. If the moving party meets its burden, the non-moving party must then "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

II. Background[1]

Plaintiffs initially filed this suit seeking injunctive relief directing Defendant Board of Elections to place the names of Plaintiffs Phillip J. Smallman ("Smallman") and John G. Serpico

[1] In support of their motion for summary judgment, Plaintiffs have submitted a 160-paragraph statement pursuant to Local Civil Rule 56.1. (Plaintiffs' Local Rule 56.1 Statement ("Pl. 56.1").) In reply, Defendants contest all but twenty-three of Plaintiffs' numbered paragraphs and put forth fourteen numbered paragraphs that they assert are uncontested facts. (Defendant's Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 ("Def 56.1").) The court finds almost the entirety of Plaintiffs' and Defendant's 56.1 statements to be unhelpful in determining the uncontested facts. Plaintiffs' 56.1 statement is largely a numbered rendition of statements supported only by inadmissible evidence, assertions of law, and gratuitous or unsupported allegations (*e.g.*, "It is difficult nowadays finding volunteers to circulate designating petitions." (Pl. 56.1 ¶ 31); "People sometimes forget their political party enrollment." (Id. ¶ 41)). Similarly, Defendant's 56.1 statement simply provides the court with various statistics from the Board of Elections and from the census (*e.g.*, "The citizen population of persons aged 18 and over in New York State in the year 2000 was approximately 12,478,901" (Def 56.1 ¶ 4)). Neither 56.1 statement reviews the uncontested facts in an illuminating fashion.

("Serpico") (collectively, "Candidate Plaintiffs") and former Plaintiff Zachary Lareche ("Lareche") on the ballot for Judge of the Civil Court of the City of New York in Kings County in the September 12, 2006 Democratic Party primary election. (Complaint ("Compl.") (Docket Entry # 1).) The other four remaining plaintiffs in the case, Lori S. Maslow ("Maslow"), Carol Faison ("Faison"), Jemel Johnson ("Johnson"), and Kenneth Bartholomew ("Bartholomew") (collectively, "Subscribing Witness Plaintiffs"), each sought to serve as subscribing witnesses for the Candidate Plaintiffs in that election, even though they were not enrolled in the Democratic Party at the time. (Id.)

At the same time Plaintiffs filed their Complaint, they also filed a motion for a preliminary injunction (Docket Entry #3), on which no action was taken initially because Defendant had not yet ruled on the objections filed against Smallman's, Serpico's, and Lareche's petitions (Docket Entry # 6). The motion for a preliminary injunction was later rendered moot and never ruled upon by Judge Edward R. Korman because the Board of Elections never removed Smallman and Serpico from the ballot due to a lack of valid signatures: even without the contested signatures, both Smallman and Serpico had a sufficient number of signatures to appear on the ballot, which, in fact, they did. With regard to then-Plaintiff Lareche's petition, even if the signatures procured by the subscribing witnesses who were not enrolled in the Democratic Party had been counted in favor of Lereche's petition, he still would have lacked a sufficient number of signatures to earn a position on the ballot. (Docket Entry # 9.)

Specifically, to attain a position on the Democratic primary election ballot in 2006, Smallman and Serpico needed to file a designating petition containing a minimum of 4,000 valid signatures of enrolled Democrats. (Pl. 56.1 ¶ 80 (citing Declaration of Aaron Maslow ("Maslow Decl.") ¶ 23); Def. 56.1 ¶ 80.) Defendant prepared a report ("Clerk's Report") detailing

objections to Serpico and Smallman's petitions. (Pl. 56.1 ¶¶ 93, 96; Def 56.1 ¶¶ 93, 96.) For Serpico's petition, Defendant's Clerk's Report states that 109 signatures were invalid because the subscribing witnesses were not registered to vote and 211 were invalid because the subscribing witnesses were not enrolled in the correct party; overall, the Clerk's Report states that of the 11,971 signatures filed on Serpico's petition, 7,117 were invalid and 4,854 were valid, still more than the 4,000 required to attain a position on the ballot. (Pl. 56.1 ¶¶ 94-95; Def. 56.1 ¶¶ 94-95.) For Smallman's petition, Defendant's Clerk's Report states that 119 signatures were invalid because the subscribing witnesses were not registered to vote and 211 were invalid because the subscribing witnesses were not enrolled in the correct party; overall, the Clerk's Report stated that of the 13,397 signatures filed on Smallman's petition, 7,712 were invalid and 5,685 were valid, also more than the 4,000 required to attain a position on the ballot. (Pl. 56.1 ¶¶ 97-98; Def. 56.1 ¶¶ 97-98.)

The parties do not contest that, despite the invalidation of signatures witnessed by non-party enrollees, the Candidate Plaintiffs had a sufficient number of signatures remaining on their 2006 designating petitions to attain positions on the ballot. (Pl. Mem. at 1.) The parties also do not contest that the Candidate Plaintiffs lost the primary election. (Id.) The remaining Plaintiffs have filed an Amended Complaint seeking to conform this action to one for a declaratory judgment.[2] (Id.) Plaintiffs' Amended Complaint for declaratory judgment also states that the Subscribing Witness Plaintiffs wish to support candidates of another party at some point in the

[2] After filing their motion for a preliminary injunction, which was rendered moot, Plaintiffs withdrew all claims against all defendants other than Defendant Board of Elections (Docket Entries # 11, 14, 27), and Plaintiff Lareche and Plaintiff Livie Anglade withdrew from the case entirely (Docket Entry # 14).

future by collecting petition signatures for the Candidate Plaintiffs or other named and unnamed candidates.

A. Standing to Contest an "Injury-in-Fact"

In order to have standing under Article III, a plaintiff must demonstrate that (1) he or she has suffered an "injury in fact" that is "concrete and particularized" as well as "actual or imminent," rather than "conjectural or hypothetical"; (2) the injury is "fairly traceable" to the challenged conduct; and (3) it is likely, rather than "merely speculative," that the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, (1992) (internal quotation marks omitted). A plaintiff must at least allege that he suffered an injury at the hands of a defendant for his claim against that defendant to survive summary judgment. Wachtler v. County of Herkimer, 35 F.3d 77, 82 (2d Cir. 1994); see also Lujan, 504 U.S. at 560. At the summary judgment stage, Plaintiffs must set forth specific facts to support the invocation of federal jurisdiction and to prove standing. Id., 504 U.S. at 561. For the reasons that follow, the court finds that Plaintiffs have Article III standing to bring the instant lawsuit.

i. Smallman and Serpico and their Subscribing Witnesses

Defendant argues that Plaintiffs Smallman and Serpico and all Subscribing Witness Plaintiffs suffered no injury-in-fact because Smallman and Serpico qualified for the ballot regardless of the treatment of the disputed signatures and because former Candidate Plaintiff Lareche did not qualify for the ballot even had the contested signatures been counted. Plaintiffs contend that the Candidate Plaintiffs did suffer an injury-in-fact by being "circumscribed as to who could carry their First Amendment message during the petitioning period." (Pl. Mem. at 4; Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment ("Pl. Reply Mem.") at 4.)

The court finds the cases cited by Defendant in support of its position regarding standing to be somewhat unhelpful, but, based on its own independent research, the court finds the Second Circuit's reasoning and holding in Lerman v. Board of Elections in City of New York, 232 F.3d 135 (2d Cir. 2000), to be highly instructive on this issue. In Lerman, the Court of Appeals dealt with a similar election-law suit in which a subscribing witness plaintiff alleged that New York's witness residence requirement violated the First and Fourteenth Amendments on its face by permitting only district residents to be eligible to witness signatures on candidates' designating petition. Id. The Board of Elections contended that, as a resident of the another council district, the plaintiff lacked Article III standing because she was "unaffected by the outcome" of the election in the council district that the suit involved. Therefore, the Board argued, the plaintiff suffered no injury from the absence of her candidate from the primary ballot in that district. Id. The Circuit Court disagreed and held that the plaintiff did have standing:

> Lerman appears rather easily to have met the three requirements set forth by [Lujan]. Having associated with [a candidate] in order to promote his political candidacy and help him gain access to the primary election ballot, [the plaintiff] asserts injury in having been deprived of the opportunity to gather signatures in behalf of his candidacy. Moreover, the [Board of Elections] has acted directly to strike those designating petitions witnessed by [the plaintiff], and in the context of an action challenging the legality of government action, we must draw some significance from the fact that [the plaintiff] is a direct object of the action . . . at issue. Given the nature of the defendants' challenged conduct, there should be little question that the [defendants'] action . . . has caused [her] injury, and that a judgment preventing . . . the action will redress it.

Id. (citations and internal quotation marks omitted.)

While it is true that Defendant did not ultimately take any action on the objectionable signatures here, nevertheless the court cannot conclude that both the Candidate Plaintiffs and the Subscribing Witness Plaintiffs did not suffer any injury-in-fact. As the court held in Lerman, a

restriction that is alleged to cause injury-in-fact to a plaintiff's rights to engage in interactive political speech and expressive political association is sufficient to confer standing under Article III. See also Meyer v. Grant, 486 U.S. 414 (1988) (holding that a Colorado statute regulating the ballot initiative process that made it a felony to pay petition circulators was unconstitutional because it abridged the appellees' right to engage in political speech and therefore violated the First and Fourteenth Amendments to the Federal Constitution). It thus follows logically that the Subscribing Witnesses for Smallman and Serpico's petitions have Article III standing to pursue these claims. It is also important to note, at this stage in the discussion, that just because Plaintiffs here have alleged an injury-in-fact that is "fairly traceable to the challenged conduct and redressable by a favorable judicial decision," that does not mean that Plaintiffs have a valid claim on the merits. See Lerman, 232 F.3d 142 n.9 ("The two questions . . . are distinct") (citing Coalition for Sensible & Humane Solutions v. Wamser, 771 F.2d 395, 399-400 (8th Cir. 1985) (holding that unregistered voter and individuals denied status as registrars have standing to challenge registrar appointment process, but denying their claim on the merits)).

The court acknowledges that the candidate in Lerman was not a plaintiff to that case; however, here, not only do the Subscribing Witness Plaintiffs specifically allege that the state restricted their ability to engage in interactive political speech and expressive political association, but the Candidate Plaintiffs do as well. For the Candidate Plaintiffs, the issue is whether they may utilize the services of non-party members as subscribing witnesses to their petitions. Just as the Circuit Court held in Lerman that a favorable judgment would redress the injury to the plaintiff's rights to engage in political association, here too, a favorable judgment would redress an injury to the Candidate Plaintiffs as well as the Subscribing Witness Plaintiffs. The injury-in-fact that gave the plaintiff in Lerman standing – the process of engaging in

political activity in support of a candidate's candidacy – is equally applicable to the candidate himself or herself, who is injured by not being able to pick his or her subscribing witness.

ii. Lareche's Subscribing Witnesses

Similarly, even though Lareche is no longer a plaintiff in this action, his Subscribing Witness Plaintiffs are, and thus the standing issue remains relevant to them. The court finds that Lareche's subscribing witnesses similarly survive the test for standing laid out above.

Defendant argues that Lareche's inability to have his name placed on the ballot was not causally due to the Party-Witness Rule and thus the injury to Lareche and to his Subscribing Witness Plaintiffs was not proximately caused by the conduct complained of. It is true that Lareche lacked enough signatures to obtain a place on the ballot even had those disputed signatures been counted in his favor. However, given the above analysis, Defendant is wrong to argue that none of Lareche's Subscribing Witness Plaintiffs has standing to assert claims in connection with Lareche's failed candidacy. They, just like the Subscribing Witness Plaintiffs for Smallman and Serpico, allege violations of their rights to engage in interactive political speech and expressive political association. That is sufficient to confer standing under Article III.

B. Mootness/Future Anticipated Injury-in-Fact

During the course of the litigation of this case, the election at issue occurred and, as noted above, arguably mooted some of Plaintiffs' claims. However, the rule of law is clear that a claim is not moot where it is "capable of repetition, yet evading review." Meyer v. Grant, 486 U.S. 414, 417 (1988). To establish that a claim is capable of repetition yet evading review, Plaintiffs must prove that (1) there will not be sufficient time to litigate the challenged action fully prior to its becoming moot due to the passage of time, and (2) it is reasonable to expect that

they will be subject to the same action again. Id. Plaintiffs have amended their initial claims to argue that they will suffer an injury in the future because the Subscribing Witness Plaintiffs intend to support other potential candidates, including the Candidate Plaintiffs and other named and unnamed candidates in future elections. The Second Circuit has stressed that, in a situation such as this one, Plaintiffs have standing to pursue these claims based on their argument that their claims are capable of repetition yet evading review. Id.

Just because the Candidate Plaintiffs attained a position on the ballot, as the above discussion regarding standing indicates, does not mean that the Candidate Plaintiffs will not suffer an injury-in-fact in future specified and unspecified elections. The question is whether any alleged future injury is capable of repetition yet evading review. Again, the court reiterates that a finding of standing at this point does not mean that Plaintiffs have a viable claim on the merits.

The crux of Defendant's standing argument is that Plaintiffs are merely speculating that the Candidate Plaintiffs intend to stand for elective office in the future, if and when such an office becomes available. It is even more speculative, Defendant argues, whether, at the time of these unspecified future elections, the unspecified candidates will seek to include the Subscribing Witness Plaintiffs as subscribing witnesses. In reply, Plaintiffs argue that their claims are not speculative and give a few examples of the future elections and candidates to which they refer.

In support of their position, for example, Plaintiff Lori Maslow, a registered Democrat, asserts that she intends to petition for her husband, Aaron D. Maslow – who just so happens to be Plaintiffs' counsel – to be a candidate for member of the Kings County Republican County Committee from the 91st Election District of the 59th Assembly District in Kings County.

(Reply Declaration of Aaron D. Maslow in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment ("Aaron D. Maslow Decl.") ¶ 4 (citing Lori Maslow Declaration ¶ 12).) In addition to Lori Maslow's affidavit, the other Subscribing Witness Plaintiffs also claim that they intend to support other candidates in the future, including Candidate Plaintiff Smallman, whenever they run in the future. (See Lori Maslow Decl. ¶ 12; Faison Decl. ¶ 12; Batholomew Decl. ¶ 11; Johnson Aff. Response to Interrogatories ¶ 11.) Defendant argues, in reply, that the petitioning for the Kings County Republican County Committee from the 91st Election District of the 59th Assembly District in Kings County has not yet begun. That is true: as the reply declaration of Aaron D. Maslow itself states: "The petitioning for that position will take place over a five and a half week period from June to July of [2008]. . . . The petition will be filed with Defendant during the filing period in July." (Id.) However, with regard to standing, the issue is not whether the petitioning has begun, but whether, once it does, the same situation of which Plaintiffs complain will repeat itself, yet be capable of evading judicial review.[3]

Overall, Plaintiffs' claims of future injury are premised on the argument that, in the future, they may find themselves subject to the same limitations on non-enrolled signatories and will be unable to obtain proper judicial review at that time since an eventual election will moot their claims. In Lerman, the facts of which are described above, the Second Circuit confronted a

---

[3] There is a possible ethical issue inherent here, since there is no evidence before this court that Aaron Maslow would in fact seek to appoint Lori Maslow as a subscribing witness. This raises a troubling issue for the court since, even were there to be evidence on that point, Aaron D. Maslow, Plaintiff's counsel, is likely a necessary witness for Plaintiff Lori Maslow to establish standing, a situation that may run afoul of a number of ethical and legal rules. *E.g.*, 22 N.Y.C.R.R. § 1200.21. However, since the court finds that standing exists as a matter of law even without this possible testimony because of past injury, the court need not reach any conclusion about whether Aaron D. Maslow's representation creates such a conflict.

very similar argument:

> The NYC Board argues that the plaintiffs' claims are moot, since the September 1999 primary election is over, having taken place without [the candidate's] name on the ballot. However, this contention is mistaken since the plaintiffs' claims fall within the exception to the mootness doctrine for issues capable of repetition, yet evading review. Both of the two preconditions for invoking this doctrine have been met – the challenged action was too short to be fully litigated prior to its expiration, and there is a reasonable expectation that the same complaining parties would be subject to that same action in the future. Since the issues presented in this case will persist in future elections, and within a time frame too short to allow resolution through litigation, the NYC Board's mootness argument necessarily fails.

232 F.3d at 141 (citations and internal quotation marks omitted). Similarly, in Members for a Better Union v. Bevona, 152 F.3d 58, 61-62 (2d Cir. 1998), the Second Circuit found that Plaintiffs, members of Local 32B-32J of the Service Employees International Union, AFL-CIO, had standing to bring a suit against the president of the union to promote the fairness of the membership's vote on constitutional amendments proposed by the plaintiff union members. Even though the vote was already finished at the time the court heard the case, Plaintiffs argued that they intended to seek a permanent injunction that would require all future votes on constitutional amendments to be conducted by a neutral party during extended voting hours. The Circuit Court agreed that they had standing since the union's challenge could not be fully litigated before the vote and because the plaintiffs' intention to seek permanent injunctive relief in that case confirmed that "these same parties are reasonably likely to find themselves again in dispute over the issues raised in this appeal." Id. at 61.

In this case, the challenged action was too short to be fully litigated prior to its expiration and there is a reasonable expectation that the same complaining parties would be subject to the same action in the future. See Meyer, 486 U.S. at 417-418 n.2; Lerman, 232 F.3d at 141. Any

mootness argument, or argument based on Plaintiff's future standing, must fail, since the issues presented in this case undoubtedly "will persist in future elections, and within a time frame too short to allow resolution through litigation." Lerman, 232 F.3d at 141 (quoting Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 628 (2d Cir. 1989)).

C. Constitutional Claims

As to the merits, Plaintiffs argue that (1) the Party-Witness Rule is not sufficiently narrowly tailored to advance the asserted interest of protecting the associational interests of political parties, and (2) the Party-Witness Rule is not sufficiently narrowly tailored to advance the asserted interest of protecting against ballot access fraud. As such, they argue that the law "violates their First Amendment rights to ballot access, to freedom of speech, and to associate for the advancement of political beliefs." (Pl. Mem. at 2.) Specifically, Plaintiffs argue that (1) the Party-Witness Rule "violates the First Amendment rights to free speech and to associate for the advancement of political beliefs of those citizens 18-years of age and older whom the statute precludes from procuring and witnessing signatures for them," and (2) "the First Amendment right of voters to vote for [Smallman and Serpico] is affected by the challenged statutory provision because if they cannot make the ballot or are hindered in making the ballot due to it, the ability of the voters to vote for them or to hear their campaign message is negatively impacted." (Id.) Furthermore, the Subscribing Witness Plaintiffs argue that (1) "the disqualification of signatures procured and witnessed by them on party designating petitions merely because they are not enrolled in the party whose primary is being contested violates their First Amendment rights to freedom of speech and to associate for the advancement of political beliefs," (2) the law compelled Plaintiff Faison to remain a Democrat when she "desires to be able to change her enrollment back to Republican but still be able to collect signatures for certain

Democrats" thus "violat[ing] her Constitutional rights," (3) "if the Board of Elections were to invalidate a designating petition of a candidate for the primary election of the party in which [Plaintiff Maslow] is enrolled due to the disqualification of signatures witnessed by other persons who were not registered voters or not enrolled members of that party, [Plaintiff Maslow] will have lost the Constitutional right to vote for said candidate, and (4) "since New York Election Law section 6-132 authorizes notaries public and commissioners of deeds to procure and attest to signatures on designating petitions without having to be registered voters and enrolled members of the party of the primary contest, but requires [Plaintiffs] to be registered voters and enrolled party members to witness signatures, their Equal Protection rights are violated." (Id. at 2-3.)

By Order dated December 19, 2007, this court ordered the parties' motions for summary judgment held in abeyance pending the U.S. Supreme Court's decision in New York State Bd. of Elections v. Lopez Torres, 128 S.Ct. 791 (2008). I find Lopez Torres to be controlling in favor of Defendant and for that reason grant summary judgment for Defendant.

In Lopez Torres, the Court considered a Section 1983 action against the New York State Board of Elections in which the respondents argued that New York's statutory scheme for political parties' nominating candidates for New York State Supreme Court judges violated their political association rights under the First Amendment. Since 1921, New York's election law has required parties to select their nominees by a convention composed of delegates elected by party members. 128 S.Ct. at 793. An individual running for delegate must submit a 500-signature petition collected within a specified time, and the convention's nominees appear automatically on the general-election ballot, along with any independent candidates who meet certain statutory requirements. Id. The respondents filed a suit seeking, inter alia, a declaration

that New York's convention system violates the First Amendment rights of challengers running against candidates favored by party leaders and an injunction mandating a direct primary election to select New York Supreme Court nominees. Id.

The Court held that "a political party has a First Amendment right to limit its membership as it wishes and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform," even though a state's power to prescribe party use of primaries or conventions to select nominees for the general election is "not without limits." 128 S. Ct. at 793 (citing California Democratic Party v. Jones, 530 U.S. 567, 577 (2000)). The Court wrote that the respondents, who claimed their own associational right to join and have influence in the party, were in no position to rely on the associational right that the First Amendment confers on political parties. Id. at 797-799. The Court further rejected the respondents' contention that New York's electoral system did not assure them a fair chance of prevailing in their parties' candidate-selection process. Id. at 798. Finding "no support in th[e] Court's precedents" for such a proposition, the Court found the New York law's signature and deadline requirements to be "entirely reasonable" since a state may demand a minimum degree of support for candidate access to a ballot. Id. (citing Jenness v. Fortson, 403 U.S. 431, 442 (1971)).

The Lopez Torres Court further rejected the respondents' arguments that the state convention process following the delegate election did not give them a realistic chance to secure their party's nomination because the party leadership garners more votes for its delegate slate and effectively determines the nominees. "This says no more than that the party leadership has more widespread support than a candidate not supported by the leadership. Cases invalidating ballot-access requirements have focused on the requirements themselves, and not on the manner

in which political actors function under those requirements." Id. at 798-800 (citing Bullock v. Carter, 405 U.S. 134 (1972)). "Those cases do not establish an individual's constitutional right to have a 'fair shot' at winning a party's nomination." Id. Finally, the court rejected as "a novel and implausible reading of the First Amendment" the respondents' argument that the existence of an entrenched "one-party rule" in the State's general election demands that the First Amendment be used to impose additional competition in the parties' nominee-selection process. Id. at 800-01.

The instant limits imposed by the New York statute at issue in this case fall well short of the limits set forth on the state by Lopez Torres and California Democratic Party. Simply put, the Court has granted New York State enormous latitude to exclude non-members from participating in the selection of and "determin[ing] the candidate bearing the party's standard in the general election." Lopez Torres, 128 S.Ct at 798. Associational rights belong to the individual only so far as they allow those individuals to join a political party, id. at 797-98, but associational rights belong to the political party such that the party – not the individual – may structure its own internal processes and "select the candidate of the party's choosing," id. at 798. As the Court wrote: "The weapon wielded by these plaintiffs is their *own* claimed associational rights not only to join, but to have a certain degree of influence in, the party . . . This contention finds no support in our precedents." Id. at 798.

Neither Defendant nor Plaintiffs contest the principal that a political party has limits on its ability to limit its membership and choose a candidate-selection process. However, Plaintiffs seek to draw a line as to what those limits are that Lopez Torres refused to draw. Plaintiffs take the fact that the Court wrote that "[t]hese rights are circumscribed," 128 S.Ct. at 797, to mean that "[h]ence, the associational membership and candidate-selection rights of a party cannot

override the First Amendment rights of lawful candidates to select adults of their choosing to act as their designating petition circulators." (Letter from Aaron D. Maslow to the court dated January 31, 2008 at 2.) But the Court implied no such thing. Indeed, with regard to the issue of what limits may be placed on the state, the Lopez Torres Court cited only to California Democratic Party v. Jones, 530 U.S. 567 (2000), which itself held that a political party has enormous leeway to choose its candidate-selection process as long as it did not apply racially discriminatory rules that would violate the Fifteenth Amendment. 128 S.Ct. at 798. As a general principal, however, the Court wrote in California Democratic Party that "[i]n no area is the political association's right to exclude more important than in its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views." 530 U.S. at 568.

Plaintiffs here argue that they have been denied the opportunity to influence and meaningfully participate in the nominee-selection process in Kings County because they are not members of the Democratic Party, which is the dominant party in New York. As the Lopez Torres Court wrote: "Competitiveness may be of interest to the voters in the general election, and to the candidates who choose to run against the dominant party. But we have held that those interests are well enough protected so long as all candidates have an adequate opportunity to appear on the general-election ballot." Id. at 800. Indeed, Candidate Plaintiffs can participate in the political process by seeking to petition to appear directly on the general election ballot, rather than participating in the Democratic Party primary. N.Y. Election Law §§ 6-138, 6-140, & 6-142. Thus, given the rationale set forth in Lopez Torres concerning competitiveness in the Democratic Party nominating process, the court cannot conclude that the Subscribing-Witness

Rule at issue here unconstitutionally denies Plaintiffs an opportunity to participate in the electoral process.

The court further finds Plaintiffs argument that "petitioning for a primary election is not a component of party structure and internal party processes" (Letter from Aaron D. Maslow to the court dated March 31, 2008) to be unavailing. Lopez Torres and California Democratic Party broadly address the constitutional rights afforded to political parties to choose their standard bearers, and that logically and clearly encompasses the manner in which it runs its petition process. The Supreme Court employed broad brush strokes in laying out the constitutional rights of association that belong to political parties – including their ability to exclude non-members. The decision clearly applies here.

III. Conclusion

For the reasons stated above, the court denies Plaintiffs' motion for summary judgment and grants Defendant's motion for summary judgment. The Clerk of Court is directed to close the case.

SO ORDERED.

Dated: May 23, 2008
Brooklyn, N.Y.

/s Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge